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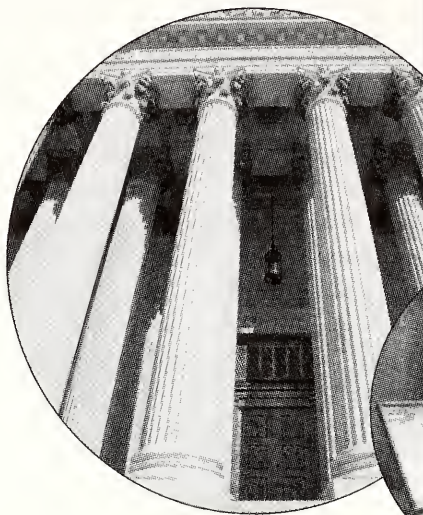
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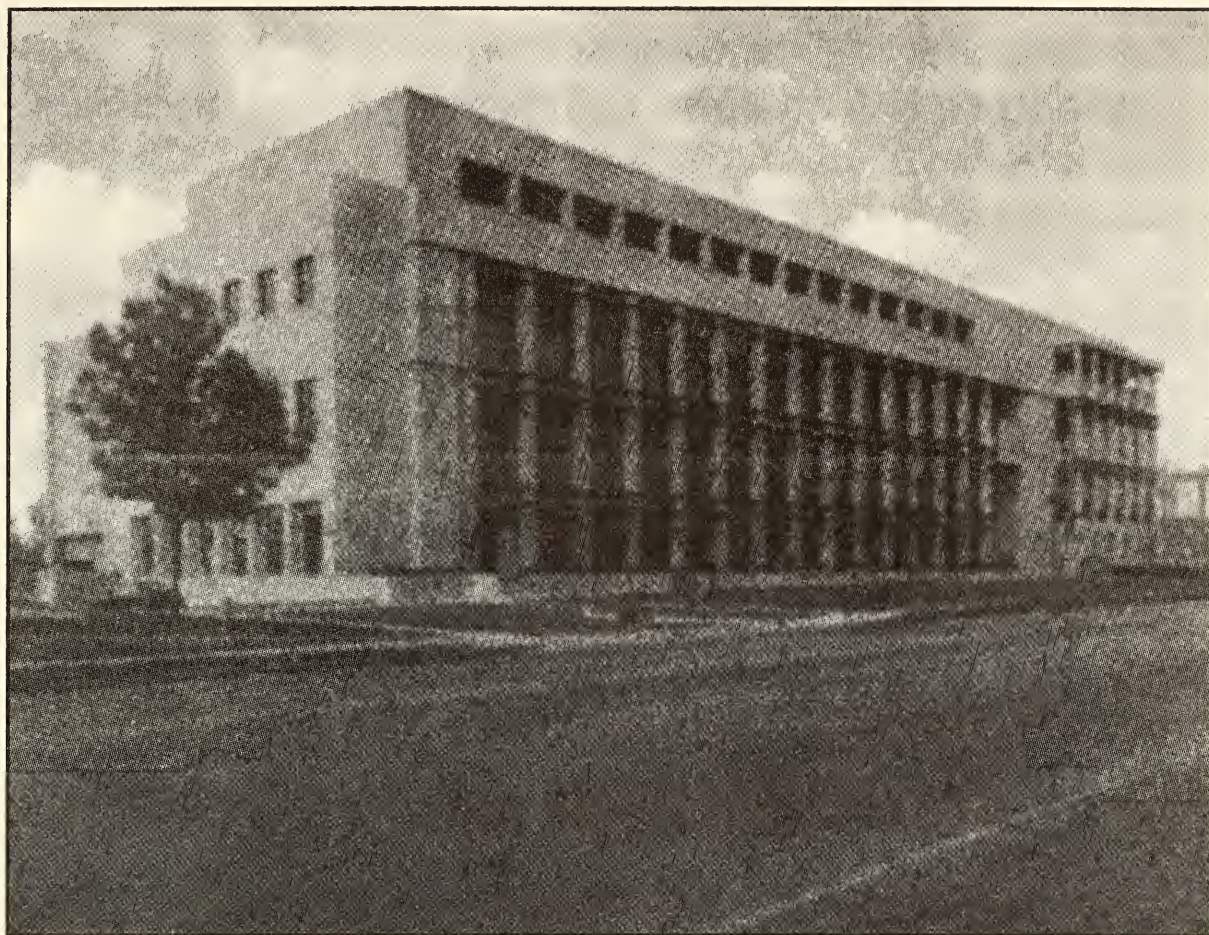
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“YOU HAVE THE RIGHT TO REMAIN SILENT”: A CASE FOR THE USE OF SILENCE AS SUBSTANTIVE PROOF OF THE CRIMINAL DEFENDANT’S GUILT

DAVID S. ROMANTZ*

*The cruellest lies are often told in silence.*¹

INTRODUCTION

A fundamental canon of criminal justice demands that the government produce evidence against the accused “by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”² To effectuate this promise, the Fifth Amendment’s Self-Incrimination Clause provides that, “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.”³ The core protection guaranteed by this clause prohibits the government from compelling a defendant to bear witness against himself at his own criminal trial.⁴ The criminal trial, and not the government’s investigation of crime, is the bailiwick of the clause’s proscriptions. To perfect the protection afforded by the Fifth Amendment, however, the Court has allowed a person to invoke the privilege against self-incrimination *before* his criminal trial, but only when his answers in response to official questions might

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1. ROBERT LOUIS STEVENSON, VIRGINIBUS PUERISQUE 31 (J.M. Dent & Sons, Ltd. 1963) (1881).

2. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citing *Chambers v. Florida*, 309 U.S. 227, 235-38 (1940)).

3. U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment protects defendants in state proceedings against compulsory self-incrimination to the same extent as it protects defendants in federal proceedings. *See Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (holding that, under the Fourteenth Amendment Due Process Clause, the admissibility of inculpatory statements in a state criminal prosecution is tested by the same standard applied in federal criminal prosecutions).

4. *See Griffin v. California*, 380 U.S. 609, 614-15 (1965) (holding the Fifth Amendment prohibits the government from commenting on the defendant’s decision not to testify); *see also infra* note 115 and accompanying text (discussing *Griffin v. California*).

incriminate him in future criminal proceedings.⁵ This rule stems from the observation that “an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.”⁶

The Supreme Court’s seminal opinion in *Miranda v. Arizona* again extended the Fifth Amendment’s privilege against self-incrimination to include incriminating statements made in the course of a custodial interrogation during the investigation of crime.⁷ Generally, *Miranda* announced that when a defendant is subjected to custodial interrogation, his statements are inadmissible as substantive proof of his guilt unless he voluntarily and knowingly waives his rights *after* the police (or other government official) first apprise him of the now-famous *Miranda* warnings.⁸ These warnings remind a defendant

that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.⁹

A defendant who remains silent after receiving the warnings is presumed to have invoked his right to remain silent.

Since *Miranda*, the Court has tempered its prophylactic rule and allowed the government to use a defendant’s pre-*Miranda* silence to impeach his credibility, largely relying on the idea that a defendant’s pre-*Miranda* silence is not linked to the warning’s implicit assurance that silence would carry no penalty, and the idea that silence, absent official compulsion, simply does not raise a constitutional concern.¹⁰ These ideas have allowed some federal courts to permit the government to use a defendant’s pre-arrest and pre-*Miranda* silence against him not only to impeach his credibility, but also to prove his guilt.¹¹ Other federal circuits, however, have read broadly *Miranda* and its progeny to prohibit the use of a defendant’s pre-*Miranda* silence in the government’s case-in-chief.¹²

5. See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (stating that the Fifth Amendment protects a person before his criminal trial); see also *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The *Lefkowitz* Court would allow a person to invoke his privilege against self-incrimination in any “proceeding, civil or criminal, formal or informal.” *Lefkowitz*, 414 U.S. at 77. To prevent the government from compromising his rights, the Self-Incrimination Clause also bars the government from commenting on the defendant’s exercise of his right not to testify. See *Chapman v. California*, 386 U.S. 18, 25-26 (1967) (holding the government may not comment on defendant’s failure to testify).

6. *Michigan v. Tucker*, 417 U.S. 433, 440-441 (1974).

7. See *infra* Part II (discussing *Miranda v. Arizona*).

8. See *infra* Part II (discussing *Miranda v. Arizona*).

9. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

10. See *infra* notes 122-26 and accompanying text (discussing the use of pre-*Miranda* silence to impeach a defendant).

11. See generally *infra* Part IV (discussing the split in federal circuits over the use of a defendant’s pre-*Miranda* silence in the government’s case-in-chief).

12. See generally *infra* Part IV.A (discussing federal circuits that bar, on constitutional

Still other circuits bar the use of a defendant's pre-*Miranda* silence in the government's case-in-chief, but on evidentiary grounds, not on constitutional grounds.¹³ Thus, despite the Court's steady effort since *Miranda* to plug the doctrinal holes in its original opinion, the question remains whether the Fifth Amendment's Self-Incrimination Clause reaches a defendant's pre-*Miranda* or pre-arrest silence thereby barring its use in the government's case-in-chief, or whether the warnings themselves trigger the defendant's constitutional right to remain silent thereby allowing the government to use his pre-*Miranda* silence as substantive proof of his guilt.¹⁴

This Article will examine the use of a defendant's pre-*Miranda* silence in the government's case-in-chief. First, the Article will explore briefly the history and the use of a defendant's silence before the Court decided *Miranda v. Arizona*. Second, the Article will discuss the *Miranda* opinion—the rules it announced and the rules it did not announce. Third, this Article will examine *Miranda*'s progeny, focusing on the Court's treatment of silence in its impeachment cases. Fourth, the Article will examine the split in the federal circuit courts of appeal on the issue of whether the government's use of a defendant's pre-*Miranda* silence to prove his guilt violates the Constitution. Finally, this Article posits that neither *Miranda* nor the Constitution bar the use of a defendant's pre-arrest or pre-*Miranda* silence in the government's case-in-chief.

I. THE USE OF SILENCE BEFORE *MIRANDA*

In 1926, the United States Supreme Court determined that a criminal defendant who elects to testify on his own behalf may be impeached by his own prior silence.¹⁵ In *Raffel v. United States*, the petitioner was indicted and twice tried for conspiring to sell alcoholic beverages in violation of the National Prohibition Act.¹⁶ At his first trial, the petitioner did not offer himself as a

grounds, the use of a defendant's silence in the government's case-in-chief).

13. See generally *infra* Part IV.B (discussing federal circuits that do not bar on constitutional grounds the use of a defendant's silence in the government's case-in-chief).

14. In fact, the United States Supreme Court recently considered no less than four cases construing *Miranda v. Arizona* in its 2003-2004 term alone. See *United States v. Patane*, 124 S. Ct. 2620, 2630 (2004) (holding that police officer's failure to recite the *Miranda* warning does not require suppression of physical evidence discovered through defendant's unwarned but voluntary statements); *Missouri v. Siebert*, 124 S. Ct. 2601, 2604-05 (2004) (holding that a defendant's post-*Miranda*-warning confession made after an unwarned confession was inadmissible at trial); *Hiibel v. District Court*, 124 S. Ct. 2451, 2460-61 (2004) (holding that a defendant's refusal to identify himself to police did not violate his Fifth Amendment right against self-incrimination); *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2151-52 (2004) (holding that state court properly applied federal law when it determined that juvenile defendant was not in custody for *Miranda* purposes).

15. *Raffel v. United States*, 271 U.S. 494, 498-99 (1926). The *Raffel* Court did not address whether evidence of a defendant's prior silence could be used in the prosecution's case-in-chief; the Court only ruled on the use of silence to impeach a defendant who testifies on his own behalf.

16. *Id.* at 495.

witness, but the jury heard incriminating testimony from a prohibition agent that Raffel had admitted he owned an illegal drinking establishment.¹⁷ The jury deadlocked.¹⁸ At the second trial, the petitioner, now aware of the prosecutor's case against him, took the stand in his own defense and denied making any statements of ownership to the prohibition officer.¹⁹ This admission prompted the court to question the petitioner about his prior silence and to ask him why he chose to remain silent at the first trial.²⁰ Raffel objected to this line of questioning, arguing that his prior invocation of his right to remain silent survived to the second trial, despite the fact that he chose to testify on his own behalf. The petitioner contended that the Constitution allowed him to waive partially his right to remain silent, while allowing him to preserve the right to answer some questions, but not others.²¹

The United States Supreme Court disagreed with the petitioner.²² It held that a defendant who offers himself as a witness in his own defense completely waives his Fifth Amendment immunity.²³ Justice Stone, writing for a unanimous Court, determined that "having once cast aside the cloak of immunity, [a defendant] may not resume it at will."²⁴ The Court continued that when a defendant takes the stand in his own defense, he does so as any other witness; and he may be cross-examined about his prior silence if that inquiry is relevant and probative to his credibility.²⁵ Clearly hostile to Raffel's notion that the Constitution allows a defendant to pick-and-choose when to remain silent after he decides to testify in his own behalf, the Court ruled that the Fifth Amendment is reserved for "those who do not wish to become witnesses in their own behalf,

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The trial transcript reported the following exchange between the court and Raffel:
"Q: Did you go on the stand and contradict anything [the prosecution] said?"

A: I did not.

Q: Why didn't you?

A: I did not see enough evidence to convict me."

Id. at 495 n.1.

21. *Id.* at 497.

22. *Id.* at 499.

23. *Id.* at 497. The Court noted a split among the states on the question of whether a court errs when it requires a defendant to disclose that he had not testified at an earlier proceeding. *Id.* at 496. The Court noted that the issue has arisen not only when a defendant is questioned about silence in a prior trial, but also when a defendant is questioned about prior silence in a previous preliminary examination, habeas corpus hearing, or bail application. *Id.* By implication, the Court's holding is applicable to any proceeding or hearing and is not limited to prior trials.

24. *Id.* at 497.

25. *Id.* The Court determined that the admissibility of statements regarding a defendant-witness's prior silence rests on evidentiary rules, not the Constitution. *Id.* If the prosecution's inquiry is logical, relevant, and competent within the scope of evidentiary rules, then the inquiry (and its response) is admissible. *Id.*

and not for those who do.”²⁶ The Court explained that when a defendant chooses to take the stand in his own defense, he waives completely his constitutional privileges against self-incrimination; he testifies as any other witness, and thus he is subject to cross-examination as to any fact in issue so long as the examination complies with relevant evidentiary rules.²⁷ The Court implicitly recognized that the privilege to remain silent survives only so long as a defendant continues to cloak himself in its protection.

Seventeen years later, in *Johnson v. United States*, the United States Supreme Court again considered the admissibility of a defendant’s silence.²⁸ In *Johnson*, the defendant waived his right against self-incrimination and testified on his own behalf.²⁹ On cross-examination, the government asked the defendant about an offense that was not raised in the defendant’s testimony and was different from the one charged in the indictment.³⁰ The defendant objected and the court overruled the objection, determining that the question and answer bore on the defendant’s credibility and was thus admissible.³¹ When the government asked again about the offense, the defendant claimed his right against self-incrimination.³² The trial court granted the defendant’s claim.³³ The government, in its closing speech to the jury, commented at length about the defendant’s assertion of his right to remain silent.³⁴

26. *Id.* at 499. While the Court conceded that allowing the government to comment on a defendant’s prior invocation of his right to remain silent in a second trial may pressure a defendant to take the stand in his first trial (lest his silence be used against him at a second trial), or pressure him to remain silent at his second trial to preserve his silence at the first trial, it determined that these concerns “are without real substance.” *Id.* at 498-99. The Court opined that a defendant is always under some pressure to testify, whether or not he is afforded some partial immunity for his prior silence. *Id.* at 499.

27. The *Raffel* Court’s rule that the prosecution may impeach a defendant with his own prior silence, was reaffirmed in 1980. See *Jenkins v. Anderson*, 447 U.S. 231 (1980). Justice Stevens, however, in his concurring opinion questioned the continued validity of *Raffel*. *Id.* at 241 n.2 (Stevens, J., concurring) (citing *Grunewald v. United States*, 353 U.S. 391 (1957); *Johnson v. United States*, 318 U.S. 189 (1943)).

28. *Johnson*, 318 U.S. at 189.

29. *Id.* at 191. Johnson was charged with income tax evasion. *Id.* at 190.

30. *Id.* at 191.

31. *Id.* at 192.

32. *Id.*

33. *Id.* When the defendant was asked the incriminating question in cross-examination, the defendant claimed his privilege. The trial court, in response, mistakenly ruled that the defendant may decline to answer. *Id.* See *Jenkins v. Anderson*, 447 U.S. 231, 240 n.6 (1980) (noting that *Johnson* trial court mistakenly ruled that defendant could claim the privilege). The trial court should have applied *Raffel* and ruled that once a defendant takes the stand in his own defense, he completely waives his Fifth Amendment privileges.

34. *Johnson*, 318 U.S. at 193-94. The trial court offered the jury a curative instruction which asked the jury to consider the defendant’s invocation of his constitutional right only to assess his credibility. *Id.* at 194-95.

Justice Douglas, writing for a majority of the United States Supreme Court, held that the trial court erred when it allowed the government to comment on the defendant's claim of silence.³⁵ The Court noted that "where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment [by the government]."³⁶ The Court opined that once a trial court grants a defendant the protections of the Fifth Amendment, it could not allow any inference to be drawn from that claim without offending the Constitution.³⁷ While the Court was concerned with the substance and meaning of the privilege against self-incrimination, it was more troubled by the abuse of a trial court assuring a defendant that his silence would not be used against him and then using his silence against him.³⁸

While *Johnson* seemingly limited or even overruled *Raffel*'s holding that the accused completely waives his privilege if he takes the stand in his own defense, the Court merely suggested that when a trial court expressly grants a defendant's request to remain silent, even if that defendant makes the request during his own cross-examination, it must honor its own grant.³⁹ *Raffel* stood for the proposition that a defendant completely waives his Fifth Amendment rights once he chooses to testify in his own defense; *Johnson* carved out a narrow exception only when the trial court expressly grants a defendant's request for protection under the

35. *Id.* at 196. The Court noted that if the trial court had refused the defendant's assertion of his Fifth Amendment privilege on the ground that the value of his answer bore on his credibility, then no error could be assigned. *Id.*

36. *Id.* The Court analogized the case where a defendant takes the stand, waiving his Fifth Amendment privilege, but later invokes his right with the trial court's approval, to the case where the defendant never took the stand in his own defense. *Id.* at 197. In both cases, the defendant was given assurances that his silence would not be used against him.

37. *Id.* at 196-97 (citing *Phelan v. Kinderdine*, 20 Pa. 354, 363 (1853)).

38. *Id.* at 199. The Court stated that

the responsibility for misuse of the grant of the claim of privilege is the court's. . . . When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use.

Id.

39. *Id.* The Court noted with approval the notion "that when the accused took the stand 'without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience.'" *Id.* (citing *State v. Ober*, 52 N.H. 459, 465 (1873)). By implication, had the trial court not expressly granted *Johnson*'s request for the privilege, or ruled that his answer was admissible as to his credibility, then the *Raffel* rule would have likely applied.

Justice Stevens, in his concurring opinion in *Jenkins v. Anderson*, questioned the vitality of *Raffel* in light of *Johnson* suggesting that *Johnson* prohibited federal courts from granting a claim of privilege only to allow later its use against the defendant. See *Jenkins v. Anderson*, 447 U.S. 231, 241 n.2 (1980) (Stevens, J., concurring) (questioning the validity of *Raffel*). *Johnson*, however, neither overruled nor mentioned *Raffel*; and, *Johnson* is better read as a narrow exception to the *Raffel* rule rather than the wholesale abandonment of it. See *Jenkins*, 447 U.S. at 237 n.4 (noting that no court has challenged the rule in *Raffel*).

Fifth Amendment after he waives his right and testifies in his own defense. Notably, the notion that the Fifth Amendment's right to remain silent in the face of official compulsion is firmer when that privilege is guaranteed by a government official found resonance some twenty-three years later in *Miranda v. Arizona*.⁴⁰

The idea that the government may comment on a defendant's assertion of his right to remain silent was raised again in the 1957 case of *Grunewald v. United States*.⁴¹ In that case, the petitioner contended that the trial court improperly allowed the government to impeach him through his prior assertion of his Fifth Amendment right to remain silent at a grand jury investigation.⁴² The trial court, relying on *Raffel v. United States*,⁴³ determined that when a defendant waives his Fifth Amendment privilege at trial, the government may comment on a defendant's prior invocation of his right to remain silent at an earlier proceeding to impugn the credibility of his exculpatory admissions at trial.⁴⁴ The petitioner argued on appeal that the trial court erred when it allowed the government to comment on his prior claim of privilege, suggesting that *Johnson* overruled *Raffel*.⁴⁵

The *Grunewald* Court concluded that the trial court erred, but not because it violated the petitioner's constitutional rights.⁴⁶ Instead, the Court relied on *Raffel* and held that the probative value of the government's cross examination of the petitioner "was so negligible as to be far outweighed by its possible impermissible impact on the jury."⁴⁷ The Court determined that while *Raffel*

40. See *infra* Part II (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

41. *Grunewald v. United States*, 353 U.S. 391, 394 (1957).

42. *Id.* at 415. The defendants were indicted for conspiring to defraud the United States by 'fixing' tax fraud cases through bribes and the use of improper influence. *Id.* at 394-95. Max Halperin, one of three *Grunewald* petitioners, was subpoenaed to appear before a grand jury charged with investigating corruption in the Bureau of Internal Revenue. *Id.* at 416. At the grand jury investigation, Halperin pleaded the Fifth Amendment in response to incriminating questions from the government. *Id.* at 417. At trial, Halperin took the stand in his own defense and answered the same questions he refused to answer before the grand jury. *Id.* Halperin's responses on direct examination corroborated his claims of innocence. *Id.* at 416-17. During its cross examination, the government asked Halperin why he refused to answer the same questions that he answered on the witness stand; inquiring as to defendant's prior invocation of his right to remain silent. *Id.* When the defense rested, the trial court warned the jury that it could only consider Halperin's prior invocation of his right to silence to assess his credibility. *Id.*

43. 271 U.S. 494 (1926).

44. *Grunewald*, 353 U.S. at 418.

45. *Id.* Although the *Grunewald* opinion fails to flesh out the petitioner's argument, it can be inferred that Halperin relied on *Johnson* for the proposition that a trial court cannot allow comment on a defendant's prior claim of privilege under the Fifth Amendment even after a defendant later waives it, overruling *Raffel*'s holding that once a defendant invokes his right to silence, it survives despite the fact that the defendant later waives it.

46. *Id.* at 421.

47. *Id.* at 420.

allows the government to comment on a defendant's prior invocation of his right to silence if that defendant later waives the right, *Raffel* did not abandon the imperative of the trial court to examine first whether the contested cross examination was admissible.⁴⁸ Once a defendant waives his right to silence, *Grunewald* ruled, the trial court must treat him like any other witness, and the government may inquire about a defendant's prior claim of silence to impeach his credibility only when the court determines that the answer is more probative than prejudicial.⁴⁹

Raffel and *Grunewald* concluded that once a defendant surrenders the protection of the Fifth Amendment by testifying on his own behalf, he can be treated as any other witness and can be impeached by his own prior silence.⁵⁰ Both Courts implied that had the defendant not waived his right, the government could not have commented on his prior silence without undermining his Fifth Amendment rights. *Johnson* allowed the defendant to retain his privilege, even after he waived it, only when the trial court granted anew his right to not incriminate himself.⁵¹ And while *Grunewald* allowed the government to comment on a defendant's prior invocation of his right to silence to impeach his credibility after he surrenders the right, the Court affirmed that the government could never use a defendant's invocation of the Fifth Amendment right to infer guilt even after he waived it.⁵²

Raffel, *Johnson*, and *Grunewald* involved a defendant's express invocation of his right to remain silent—a defendant must invoke the right to enjoy its protections, and a defendant may surrender its privileges. Once invoked, the government may not comment on a defendant's silence in its case-in-chief even

48. *Id.* at 419-21.

49. *See also Grunewald*, 353 U.S. at 420; *Raffel v. United States*, 271 U.S. 494, 497 (1926). The *Grunewald* Court decided not to reach the issue of whether *Johnson* impliedly overruled *Raffel*; instead it treated *Raffel* as controlling precedent and framed the question in *Grunewald* as an evidentiary error, not a constitutional error. *Grunewald*, 353 U.S. at 421. Four justices concurred with the result of the *Grunewald* majority, but disagreed with its reasoning. *See id.* at 425 (Black, J., concurring). Justice Black, writing for the concurrence, failed to see how the trial court could allow the use of a constitutional privilege to discredit or convict a person and predicted that “[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.” *Id.* Justice Black found it incongruous that a privilege enumerated in the Constitution could be used against the party asserting it. *Id.* at 425-26. Justice Black, however, assumed that the privilege survives its own waiver and that it is broad enough to protect statements not used to incriminate, but to test the credibility of its holder.

50. *See supra* note 49 and accompanying text (discussing *Grunewald v. United States*).

51. *See supra* note 36 and accompanying text (discussing *Johnson v. United States*).

52. *Grunewald*, 353 U.S. at 422 (reiterating that the Constitution prohibits the government from using defendant's claim of silence under the Fifth Amendment to infer guilt of the crimes charged). The Court recognized that a basic function of the right to silence is “to protect the innocent who otherwise might be ensnared by ambiguous circumstances.” *Id.* at 421 (quoting *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557-58 (1956)).

if the defendant later waives his immunity.⁵³ The government, however, may use a defendant's prior silence to impeach his credibility as long as the probative value of the prior silence outweighs its prejudicial impact on a jury.

Historically, federal courts have judged the admissibility of a defendant's confessions and other exculpatory expressions under a voluntariness test.⁵⁴ This test was grounded in the Due Process Clause of the Fourteenth Amendment and required courts to consider the totality of all the circumstances surrounding the confession to determine whether a confession was voluntarily made.⁵⁵ Two decades later and by a slim majority, the Court decided *Miranda v. Arizona*.⁵⁶ *Miranda* determined that the admissibility of a suspect's statements made during a custodial interrogation is determined under the Fifth Amendment's privilege against self-incrimination and not under the Due Process Clause's voluntary-involuntary test.⁵⁷ It further held that the Fifth Amendment's privilege against self-incrimination exists regardless of whether it is expressly invoked, and it is only surrendered after the government warns us of the dangers of its waiver.⁵⁸ In practical terms, *Miranda* extended the Fifth Amendment's bar to the admissibility of involuntary statements made at trial or other adversary proceedings to include statements made in the course of a custodial interrogation, whether or not they were voluntarily made. But while *Miranda* sought to curtail abuses surrounding the interrogation of suspects to crime, its broad sweep and prophylactic application has allowed some opportunistic courts to extend further the once-qualified privilege against self-incrimination.⁵⁹

II. *MIRANDA V. ARIZONA*

Miranda was concerned with abuses attendant to custodial police interrogation.⁶⁰ Chief Justice Warren, writing for the majority, announced that

53. See *supra* note 52 and accompanying text (discussing *Grunewald* and the idea that the government may not use a defendant's silence to infer his guilt).

54. See *Dickerson v. United States*, 530 U.S. 428, 432-33 (2000) (discussing the history of law governing admissibility of confessions); see also *Oregon v. Elstad*, 470 U.S. 298, 307-08 (1985) (commenting on the "old" due process voluntariness test).

55. See *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding Due Process Clause prohibited the admissibility of a confession obtained through physical coercion); see also *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (applying totality test to evaluate admissibility of confession).

56. *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* opinion was a consolidation of four state cases, each involving the admissibility of a defendant's confession made while in custody and while subjected to police interrogation. *Id.* at 440. Chief Justice Earl Warren, joined by four justices, wrote for the majority.

57. *Id.* at 478-79.

58. See *infra* Part II (discussing *Miranda v. Arizona*).

59. See *infra* Part IV.A (noting federal courts prohibiting the use of pre-*Miranda* silence).

60. *Miranda*, 384 U.S. at 444. The Court first recognized that its 1964 *Escobedo* opinion failed to resolve fully the admissibility of confessions won through custodial police interrogations.

in-custody police interrogation is so inherently coercive that any statement made by a suspect is protected by the Fifth Amendment and is thus inadmissible at trial unless the police first apprise the suspect of his constitutional right to remain silent and his right to counsel—the so-called *Miranda* warnings.⁶¹ In *Miranda*, the Court purported to clarify its ruling in *Escobedo v. Illinois*.⁶² In *Escobedo*, the Court explained that incriminating statements made by a suspect who is subject to custodial interrogation are inadmissible under the Sixth Amendment unless the police first apprise the suspect of his right to counsel and his right to remain silent.⁶³ Justice Goldberg, writing for the majority in *Escobedo*, determined that the admission of statements into evidence made in the course of a custodial interrogation and made after a suspect had requested but was denied counsel was a violation of his right to counsel under the Sixth Amendment, even if the suspect voluntarily made the statements.⁶⁴ The Court, in *Miranda v. Arizona*, sought both to clarify and to extend *Escobedo* by deciding whether the Fifth Amendment's right to remain silent protects a suspect's in-custody statements to the same extent as the Sixth Amendment. *Escobedo*, however, left open two other important questions: first, whether a suspect in police custody who is subject to police interrogation can still voluntarily waive his right to silence absent the warnings; and second, when and to what extent do the 'new' constitutional safeguards under the Fifth and Sixth Amendments trump the traditional voluntary-involuntary test when determining the admissibility of a suspect's incriminating statements.⁶⁵

Id. at 440-41 (citing *Escobedo v. Illinois*, 378 U.S. 478, 484 (1964)) (noting that the application of *Escobedo* had been confused and varied). In *Escobedo*, the Court decided whether statements made by a suspect in police custody were admissible when the suspect repeatedly requested but was denied access to his lawyer. *Escobedo*, 378 U.S. at 484. The Court held that when a police investigation focuses on a particular suspect and that suspect is subjected to custodial interrogation by the police, then any incriminating statements made by the suspect are inadmissible against him if the police did not first apprise him of his constitutional right to counsel. *Id.* at 490-91. Of note, the *Escobedo* Court did not care whether the petitioner voluntarily waived his right to counsel (or his right to remain silent), but rather whether the police advised the suspect of his right to counsel (or his right to remain silent) during a custodial interrogation.

61. *Miranda*, 384 U.S. at 467-69. The Court ruled that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent," *id.* at 467-68, and a person in custody "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471.

62. *Miranda*, 384 U.S. at 440-41; see also *supra* note 60 (discussing *Escobedo v. Illinois*).

63. *Escobedo*, 378 U.S. at 490-91.

64. *Id.* In finding a constitutional bar to the admission of a suspect's incriminating statements when the suspect made those statements before police first warned him of the dangers of waiver, the Court implicitly rejected the traditional voluntary-involuntary test found in the Fourteenth Amendment's due process clause. See *id.* at 496 (White, J., dissenting) (noting that the majority abandoned the voluntary-involuntary test). Testing admissibility under the Due Process Clause's voluntary test first began in 1936 with *Brown v. Mississippi*, 297 U.S. 278 (1936).

65. *Miranda*, 384 U.S. at 441-42. The Court determined to clarify its ruling in *Escobedo* and

Miranda determined that any statement made by a suspect who is subject to custodial interrogation is inadmissible under the Fifth Amendment unless the police forewarn him of his right to remain silent.⁶⁶ “[T]his warning,” the Court concluded, “is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.”⁶⁷ The warning, then, is also an absolute prerequisite for the admissibility of in-custody statements. A suspect in custody, the Court opined, can surrender his constitutional rights only if he voluntarily, knowingly, and intelligently waives them after first hearing them.⁶⁸ A suspect in custody and subject to interrogation cannot surrender his constitutional right—even if that waiver was voluntary, knowing, and intelligent—unless he is first apprised of those rights.⁶⁹ The need for some objective safeguard, the Court noted, is “not lessened in the slightest” by the fact that a confession is voluntarily made.⁷⁰

stated its purpose was “to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Id.* Prior to *Miranda*, courts tested the admissibility of a suspect’s confessions and other inculpatory statements under a voluntariness test. *See Dickerson v. United States*, 530 U.S. 428, 432-33 (2000) (discussing the history of the law governing the admissibility of confessions). This test was largely grounded in the Due Process Clause of the Fourteenth Amendment and considered the totality of all the circumstances surrounding the confession. *See Brown*, 297 U.S. at 286 (holding that the Due Process Clause prohibited the admissibility of a confession obtained through physical coercion); *see also Haynes v. Washington*, 373 U.S. 503, 514 (1963) (applying the totality test to evaluate the admissibility of confession). Then, in 1964, the United States Supreme Court decided *Malloy v. Hogan*, which held that the Fifth Amendment’s self-incrimination clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the states. 378 U.S. 1, 6-11 (1964). Two years later, the Court decided *Miranda* and ruled that the Fifth Amendment’s self-incrimination clause determines the admissibility of a suspect’s confession obtained during custodial interrogation. *See supra* note 64 (discussing the Court’s rejection of the voluntariness test).

66. *Miranda*, 384 U.S. at 467-68. In recognizing an absolute constitutional ban on a suspect’s voluntary but unwarned custodial statements, the Court rejected the Fourteenth Amendment’s voluntary-involuntary test that courts traditionally used to determine the admissibility of a suspect’s incriminating statements. *Id.* at 471-72; *see also id.* at 502-03 (Clark, J., dissenting) (noting that the majority announced a new rule for admissibility).

67. *Id.* at 471-72. Under *Miranda*, whether a person in police custody voluntarily waives his right to silence under the Fifth Amendment is irrelevant when the police fail to first warn of the right and fail to warn of the consequence of waiving it. Implicitly rejecting the voluntary-involuntary test for the admissibility of custodial statements, the Court noted that “[o]nly through such a warning is there ascertainable assurance that the accused was aware of this right.” *Id.* at 472.

68. *Id.* at 444.

69. *Id.* at 457-58.

70. *Id.* at 457. Despite this, the Court stated that “no statement obtained from the defendant can truly be the product of his free choice.” *Id.* at 458. Thus, the Court implicitly and broadly determined that no incriminating statement by a suspect in custody can be voluntary. Using rather circular reasoning, it made no difference to the Court that a custodial confession may have been voluntary, because no custodial confession could be voluntary if it is the product of official

The *Miranda* holding is limited to the *custodial interrogation* of a suspect.⁷¹ In his opinion, Chief Justice Warren specifically and exclusively targets overzealous police practices with certain “salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.”⁷² Relying largely on anecdotal evidence of abusive and malicious police tactics, Chief Justice Warren endeavored to prove that custodial interrogation inherently jeopardizes a suspect’s constitutional rights, and that suspects must be protected from this evil.⁷³ Notably, after demonstrating the grave dangers of custodial

interrogation. Later, the Court offers that “[v]olunteered statements of any kind are not barred by the Fifth Amendment,” except when they are secured through interrogation. *Id.* at 478. The Court exempted from its ruling on-the-scene questioning, general investigative fact-finding, and any other statements made absent custodial interrogation. *Id.* at 477-78.

71. *Id.* at 471.

72. *Id.* at 445. The Court stated that the “nature and setting of . . . in-custody interrogation is essential to our decisions today.” *Id.* The *Miranda* opinion resolved the admissibility of in-custody confessions in four separate cases: *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. United States*, and *Stewart v. California*. Each case demonstrated the “evils” and abuse attendant to custodial interrogations. *Id.* at 456-57. In *Miranda*, the defendant confessed to kidnapping and rape after a two-hour custodial interrogation. Despite the fact that the defendant’s written confession indicated that the confession was made ““with full knowledge of [his] legal rights,”” the Court held that the confession was inadmissible because the defendant was not apprised of his rights before he confessed. *Id.* at 491-92. In *Vignera*, the defendant made oral inculpatory statements to a police detective and an assistant district attorney. *Id.* at 493. The Court held that the defendant’s statements were inadmissible because neither the detective nor the assistant district attorney apprised him of his constitutional rights before they interrogated him. *Id.* at 493-94. The defendant in *Westover* signed a confession after a two-hour interrogation by the F.B.I. which preceded lengthy interrogations by local authorities. While the statement indicated that the defendant was apprised of his rights, the Court found that the warnings came after a lengthy interrogation process, and thus the confession was inadmissible. *Id.* at 495-97. Lastly, in the *Stewart* case, police secured a confession after nine separate interrogations spanning five days. The record was silent on whether the defendant was ever apprised of his constitutional rights. The Court determined that the right to remain silent and the right to counsel cannot be assumed and held that the trial court’s admission of the defendant’s statements was constitutional error. *Id.* at 497-99.

73. *See id.* at 458 (noting that safeguards must be employed “to dispel the compulsion inherent in custodial surroundings”). Chief Justice Warren, in an effort to persuade the Court of the evil that lurks within custodial interrogations, devoted roughly ten full pages of the opinion to assure his brothers on the bench that custodial interrogation is constitutionally dangerous. *Id.* at 446-56. The Court pointed to “extensive factual studies” from the 1930s, opinions of the Court that evidence police brutality, and a report from the Commission on Civil Rights written in 1961. *Id.* at 445-46. The Court also cited various police practice and training manuals which describe the use of physical and mental coercion to obtain confessions through custodial interrogation. *Id.* at 448-55. After the Court carefully described the prevalence of abusive police practices, it later concluded that, under the facts before it, police did not engage in the sort of abusive practices it sought to eradicate. *Id.* at 457.

interrogation, the Court notes that the facts of *Miranda* and its companion cases “do not evince overt physical coercion or patent psychological ploys”—the very dangers the Court sought to remedy.⁷⁴ Despite this, the Court believed that abusive police practices were popular enough and that custodial interrogations were invidious enough to require authorities to first warn suspects of the consequences of waiving constitutional rights—the Court determined that these warnings serve as an absolute prerequisite to admissibility.⁷⁵ In narrowing its ruling to statements made in the context of custodial interrogation, the Court recognized the “intimate connection between the privilege against self-incrimination and police custodial questioning.”⁷⁶

The Court also purported to clarify the circumstances that trigger the requisite warnings.⁷⁷ In *Escobedo v. Illinois*, the precursor to *Miranda*, the Court explained that police must immediately warn suspects of their constitutional right to remain silent when a general police investigation begins to focus on a specific individual.⁷⁸ Recognizing the latent ambiguity of this test, the *Miranda* Court specifically defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”⁷⁹ Applying this standard to the facts before it, the Court further refined its definition of custodial interrogation as “incommunicado interrogation of individuals in a police-dominated atmosphere.”⁸⁰ Later in its opinion, the Court again narrowed its

74. *Id.*

75. The Court warned that “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” *Id.* at 461. Later, the Court stated that “the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations.” *Id.* From these lines, and others, one readily can surmise that the Court was only concerned with the application of the privilege against self-incrimination to custodial interrogations. *See id.* at 460 (limiting the question before the Court to custodial interrogations).

76. *Id.* at 458. The Court also noted that the privilege against self-incrimination protects both inculpatory admissions and exculpatory statements when they are the product of custodial interrogation. *Id.* at 476-77.

77. *See id.* at 444 n.4 (noting the Court’s effort to clarify *Escobedo*). In *Escobedo*, the Court held that when an “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect,” the police must warn the suspect of his right to remain silent. *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964).

78. *Escobedo*, 378 U.S. at 490-91. In his dissenting opinion in *Escobedo*, Justice Stewart criticized the majority for broadening constitutional protections to include voluntary statements made by suspects in the course of legitimate police investigations. *Id.* at 494 (Stewart, J., dissenting). Justice Stewart did not attack the applicability of the Fifth Amendment to a suspect’s inculpatory statements, but rather he argued that the right to remain silent under the Constitution is triggered “only after the onset of formal prosecutorial proceedings.” *Id.*

79. *Miranda*, 384 U.S. at 444.

80. *Id.* at 445.

definition by examining the investigative intent of the questioning officers and the susceptibility of the suspect to the police-dominated atmosphere.⁸¹ Suspects must be warned of the consequences of waiving their constitutional rights when the “thrust of police interrogation . . . was to put the defendant in such an emotional state as to impair his capacity for rational judgment,” and when “the compelling atmosphere of the in-custody interrogation, and not an independent decision on [the defendant’s] part, caused the defendant to speak.”⁸²

Alternatively, non-custodial police interrogations fall outside the *sine qua non* of the *Miranda* opinion. According to Chief Justice Warren, police officers need not warn suspects of the consequences of waiving their constitutional rights when they question suspects on-the-scene or question suspects who are not deprived of their freedom of action in any significant way.⁸³ Further, the admissibility of a person’s non-custodial and voluntary statements is not affected by the mandates of *Miranda*.⁸⁴ A custodial interrogation—and only a custodial interrogation—triggers the warnings. By default, then, the traditional voluntary-involuntary test for the admissibility of confessions and incriminating statements survives intact for statements made outside of a custodial interrogation.⁸⁵ As

81. *Id.* at 465.

82. *Id.*

83. *Id.* at 477-78; *see also Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (restating that *Miranda* applies only to custodial interrogation). In *Oregon v. Mathiason*, a per curiam opinion, the Court determined whether a person’s exculpatory statements were admissible under *Miranda* when that person voluntarily went to a police station, and when police had not yet *Mirandized* him and had told him that he was not under arrest. *Mathiason*, 429 U.S. at 493-94. The Court held that the statements were admissible even though the defendant made them before police warned him of his constitutional rights, because while police did question the defendant in a police station, his freedom of movement was not curtailed in any significant way—he voluntarily went to the police. *Id.* at 495. The *Mathiason* Court noted that while the police interview with the defendant might have been coercive, “a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a ‘coercive environment.’” *Id.*

84. *Miranda*, 384 U.S. at 478.

85. *Id.* Three separate dissenting opinions criticized the majority’s ruling, each noting that the majority seriously erred when it found a constitutional bar to in-custody interrogations under the Fifth Amendment. First, Justice Clark sharply disagreed with the majority and objected to the majority’s ‘either-or’ constitutional ruling that absent warnings, a confession is never admissible and that once a suspect invokes his rights, all questioning must cease. Justice Clark noted that “[s]uch a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.” *Id.* at 500 (Clark, J., dissenting). Justice Clark would continue to follow the traditional voluntary-involuntary test found in the Due Process Clause and still allow the government an opportunity to show, despite the absence of warnings, that the suspect voluntarily waived his rights. *Id.* at 503 (Clark, J., dissenting). The remaining dissenters, Justices Harlan, Stewart, and White, filed two separate dissents. First, Justice Harlan, with whom Justices Stewart and White joined, contended that the thrust of the majority’s ruling is designed “to discourage any

Justice White predicted in his prophetic dissent in *Miranda v. Arizona*, the “decision leaves open such questions as whether the accused was in custody, [and] whether his statements were . . . the product of interrogation.”⁸⁶

While the *Miranda* Court concerned itself with conventional interrogation—express questioning by police—the Court would later expand the definition of interrogation to include express questioning or its “functional equivalent.”⁸⁷

confession at all,” calling the new ruling “voluntariness with a vengeance.” *Id.* at 505 (Harlan, J., dissenting). Harlan objected to the majority’s constitutional bar to in-custody confessions found in the Fifth Amendment, when the Court’s precedent consistently and successfully evaluated the admissibility of confessions under the Due Process Clause’s voluntary-involuntary test. *Id.* at 507 (Harlan, J., dissenting). Harlan favored the “elaborate, sophisticated, and sensitive approach to admissibility of confessions” under the traditional voluntary-involuntary test, noting the test’s “ability to respond to the endless mutations of fact.” *Id.* at 508 (Harlan, J., dissenting). Harlan noted that the Fifth Amendment only proscribes compelling a defendant in a criminal case to serve as a witness against himself and had never before been applied to protect suspects at the police station. *Id.* at 510 (Harlan, J., dissenting). Second, Justice White filed a dissenting opinion with whom Justices Harlan and Stewart joined. *Id.* at 526 (White, J., dissenting). The gist of White’s dissent is that the plain language of the Fifth Amendment limits its application to only coerced statements made during criminal proceedings. *Id.* at 526-27 (White, J., dissenting). The majority opinion, according to Justice White, fabricated a constitutional rule when it concluded that all responses to custodial interrogations are coerced, thus prohibited by the Fifth Amendment. *Id.* at 535-36 (White, J., dissenting). White concluded by noting that

[t]oday’s decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation . . . [f]or all these reasons . . . a more flexible approach makes . . . more sense than the Court’s constitutional straightjacket.

Id. at 545 (White, J., dissenting).

86. *Id.* (White, J., dissenting).

87. See *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (determining that *Miranda* prohibits express questioning by police or its functional equivalent once a person invokes his right to remain silent or his right to counsel). Fourteen years after *Miranda*, the United States Supreme Court decided *Rhode Island v. Innis* and expanded the meaning of interrogation first applied in *Miranda*. *Id.* In *Innis*, police arrested Thomas Innis for murder and read him his *Miranda* rights. *Id.* at 294. Innis invoked his rights, and the police stopped interrogating him. *Id.* En route to the police station, the officers who accompanied Innis spoke to each other about the danger of leaving a weapon in a neighborhood where children might find it and use it. *Id.* at 294-95. Innis interrupted this conversation and told police where the weapon could be found. *Id.* at 295. Justice Stewart, writing for the majority, ruled that *Miranda* bars the admissibility of statements made during a custodial interrogation or “its functional equivalent.” *Id.* at 300-01. The functional equivalent of interrogation refers to “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” *Id.* at 301. As such, *Miranda* protects not only responses to express interrogation, but also any responses that the police should have known would call for a response.

According to *Rhode Island v. Innis*, *Miranda* protects not only a person's answers to express interrogation, but also protects his answers to questions, other than those inherent to arrest and custody, that the police should have reasonably known would call for an incriminating response.⁸⁸ In later cases, the Supreme Court would try twice to clarify its meaning of custody in *Miranda*.⁸⁹

First, in *California v. Beheler*, the Court explained per curiam that a person is entitled to the full panoply of rights associated with *Miranda* only when a suspect's freedom of action is curtailed to "[a] degree associated with a formal arrest"—and not before.⁹⁰ The following year, the Court decided *Berkemer v. McCarty*, and ruled that *Miranda* rights are owed at least at the moment a person is formally placed under arrest—and not before.⁹¹ Both *Beheler* and *Berkemer* stand for the idea that while the coercive atmosphere of custodial interrogation is one reason for the constitutional safeguards first articulated in *Miranda*, a coercive environment by itself does not activate the need for a *Miranda* warning.⁹² Only an arrest—or something very similar to an arrest—marks the beginning of custody for the purposes of determining the applicability of

88. *Id.* at 300-01.

89. See *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984) (holding that a person questioned during a routine traffic stop was not in custody sufficient to warrant a *Miranda*-type warning); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (holding that a suspect was not in custody during his pre-arrest interview with police).

90. *Beheler*, 463 U.S. at 1125 (citations omitted). The question before the Court was whether police must recite the *Miranda* warning to a suspect who was not under arrest and who voluntarily accompanied police to the station house where he made incriminating statements. *Id.* at 1121-22. Holding that the suspect was not owed a warning, the Court explained that *Miranda* only requires police to warn suspects who are in custody and that custody is either a formal arrest or the restraint of a suspect's freedom of movement to the degree associated with a formal arrest. *Id.* at 1125.

91. *Berkemer*, 468 U.S. at 434-35. In *Berkemer*, the Court considered whether questioning of a motorist pursuant to a routine traffic stop is a custodial interrogation for the purposes of determining the admissibility of his statements under *Miranda*. *Id.* at 425. The motorist moved to exclude various incriminating statements he had made to police at the traffic stop. He argued that because the police had failed to inform him of his constitutional rights, the admission of those statements would violate the Fifth Amendment. *Id.* at 424. The Court sought to clarify that portion of *Miranda* which requires police to apprise a person of his constitutional rights when that person "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 435 (quoting *Miranda*, 384 U.S. at 444). While conceding that a traffic stop does significantly curtail a person's freedom of action, the Court refused to broaden the application of *Miranda* to include a routine traffic stop, explaining that a traffic stop does not sufficiently impair a detainee's free exercise of his privilege against self-incrimination. *Id.* at 438-40. First, the Court noted that, unlike a stationhouse custodial interrogation, a traffic stop is temporary and brief. *Id.* at 437. Second, the Court noted that the public nature of traffic stops mitigates the need to protect persons not subjected to *Miranda*-like back-door interrogations. *Id.* at 438-39. The Court explained that the brief and public nature of a traffic stop reduces the danger that a motorist will be made to incriminate himself. *Id.* at 438 n.27.

92. *Id.* at 438-40; *Berkemer*, 468 U.S. at 1124-25.

Miranda and the admissibility of incriminating statements made in the course of an official interview.⁹³

Miranda also gave attention, although cursory, to the admissibility of silence as evidence of a waiver when a person is subjected to in-custody interrogation. The Court stated that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given.”⁹⁴ The record must show some evidence that the accused affirmatively waived his rights after police apprised him of them. The Court implicitly suggested that a suspect’s silence during custodial interrogation is inadmissible unless he validly waives his right to silence. In fact, this very silence could be used to show that the accused intends to exercise his right to remain silent.⁹⁵

When the dust settled after the *Escobedo* and *Miranda* decisions, the voluntary-involuntary test for the admissibility of statements under the Due Process Clause of the Fourteenth Amendment was largely superceded by fixed constitutional prophylactics found in the Fifth and Sixth Amendments. Even a hasty legislative attempt in 1968 to trump *Miranda* and reassert the voluntary-involuntary test failed.⁹⁶ In the wake of *Miranda*, a suspect now had an absolute

93. *Berkemer*, 468 U.S. at 434-35; *Beheler*, 463 U.S. at 1125. The *Beheler* Court noted “that [a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system.” *Beheler*, 463 U.S. at 1124 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). The Court also noted that “a noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a ‘coercive environment.’” *Id.* (quoting *Mathiason*, 429 U.S. at 495).

94. *Miranda*, 384 U.S. at 475. The Court, quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), wrote that “[p]resuming waiver from a silent record is impermissible.” *Miranda*, 384 U.S. at 475.

95. *Id.* at 473-74. After a suspect is warned of his rights, the Court stated, the suspect may invoke those rights “in any manner,” *id.* at 474, which presumably includes his continued silence.

96. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that *Miranda* may not be overruled by an Act of Congress). Two years after the Court decided *Miranda*, Congress enacted 18 U.S.C. § 3501 (1968). Section 3501(a) of the Omnibus Crime Control and Safe Street Act stated in pertinent part that “[i]n any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntary given.” *Id.* § 3501(a). Section 3501(b) of the enactment required the trial judge to consider the totality of circumstances when he or she considers whether a defendant voluntarily confessed to crime. *Id.* § 3501(b). In short, Congress attempted to overrule *Miranda* and to resurrect the traditional voluntary-involuntary test for the admissibility of confessions. In *Dickerson v. United States*, the Court considered whether an Act of Congress could overrule its *Miranda* opinion. *Dickerson*, 530 U.S. at 432. The Court held that it could not. *Id.* First, Chief Justice Rehnquist, writing for the majority, determined that *Miranda* was a constitutional ruling and not merely a prophylactic guideline. *Id.* at 438. But see *id.* at 450-57 (Scalia, J., dissenting) (arguing *Miranda* opinion was prophylactic and not a constitutional decision). As such, Congress could not legislatively supercede a constitutional decision. *Id.* at 444. Second, the majority stated that *stare decisis* directed that the Court affirm its prior decision. *Id.* at 443. Not only did *Miranda* survive a legislative attack, but it was also ratified by the United States Supreme Court over three

right under the Fifth Amendment to remain silent and to have an attorney present prior to a custodial interrogation. Moreover, law enforcement officials are now charged with triggering these constitutional rights through their invocation of the *Miranda* warnings—the rights attach when police offer them. Important questions remained to be resolved, including whether or when *Miranda* protects a defendant's inculpatory silence.

III. THE USE OF SILENCE AFTER *MIRANDA*

Well before it decided *Miranda v. Arizona*, the United States Supreme Court concluded that once a defendant surrenders the protection of the Fifth Amendment by testifying on his own behalf, he can be treated as any other witness and can be impeached by his own prior silence.⁹⁷ After *Miranda*, the question became whether the government could fairly impeach a defendant with his own silence if that silence was induced by a *Miranda*-type warning. The problem was determining when the assurances embodied in *Miranda* fully manifested and whether the Fifth Amendment protects pre-trial silence at all.

Struggling to resolve the issue, the Court drew judicially-created lines between silence that occurred pre-arrest and pre-*Miranda*, silence that occurred post-arrest and pre-*Miranda*, and silence that occurred post-arrest and post-*Miranda*.⁹⁸ The Court has grappled with this issue seven times since 1966, ultimately determining that the Fourteenth Amendment—and not the Fifth Amendment—permits the government to impeach a defendant with his pre-arrest, pre-*Miranda* silence and his post-arrest and pre-*Miranda* silence, but it does not permit the government to impeach him with his post-arrest, post-*Miranda* silence.⁹⁹ This fractured jurisprudence not only begs for the simplicity, flexibility, and efficiency of the pre-*Miranda* due process test for admissibility, but has also allowed some opportunistic courts to find a foothold for the idea that the government cannot use a defendant's pre-*Miranda* silence, or even his pre-

decades after it was originally decided.

97. See *supra* note 49 and accompanying text (discussing *Raffel* and *Grunewald*).

98. Compare *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (holding that the government can use a defendant's pre-arrest and pre-*Miranda* silence to impeach him), with *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam) (holding that the government can use a defendant's post-arrest but pre-*Miranda* silence to impeach him), and *Doyle v. Ohio*, 426 U.S. 610, 611 (1976) (holding that the government cannot use a defendant's post-arrest and post-*Miranda* silence to impeach him).

99. See *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (reaffirming *Doyle*); *Greer v. Miller*, 483 U.S. 756, 764-65 (1987) (holding that the government's single mention of a defendant's post-*Miranda* silence, followed by a curative instruction, did not offend due process); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (reaffirming *Doyle*); *Fletcher*, 455 U.S. at 606 (holding that the government can use post-arrest but pre-*Miranda* silence to impeach a defendant); *Jenkins*, 447 U.S. at 238 (holding that the government can use pre-arrest silence to impeach a defendant); and *Doyle*, 426 U.S. at 611 (holding that the government cannot use post-*Miranda* silence to impeach a defendant).

arrest silence, in its case-in-chief.¹⁰⁰

The first case after *Miranda* to consider whether the government could use a defendant's silence against him was *United States v. Hale*.¹⁰¹ In *Hale*, the Court considered whether the prosecution could impeach a defendant through questions that required him to testify to his prior silence during police interrogation.¹⁰² The government argued that under *Raffel v. United States*, a defendant who offers himself as a witness in his own defense completely waives his Fifth Amendment immunity.¹⁰³ The United States Supreme Court disagreed, but resolved the issue exercising its rules of evidence rather than the Constitution.¹⁰⁴ It reasoned that the defendant's silence in the face of police interrogation lacked significant probative value and that any reference to his silence was intolerably prejudicial to the defendant.¹⁰⁵

Although the Court left open the constitutional question in *Hale*, it resolved the question in *Doyle v. Ohio* the following year. In *Doyle*, the Court again considered whether the Constitution bars the use at trial of a defendant's prior silence.¹⁰⁶ The *Doyle* Court held that it was fundamentally unfair for the government to use a defendant's silence to impeach his testimony at trial when that silence was induced by the *Miranda* warnings.¹⁰⁷

Relying on its prior decision in *Miranda*, the *Doyle* Court explained that a defendant's silence after his arrest and in the wake of *Miranda* warnings "may be nothing more than the arrestee's exercise of . . . *Miranda* rights."¹⁰⁸ "Thus,"

100. See *infra* note 147 and accompanying text (discussing circuit courts of appeal that prohibit the use of a defendant's pre-arrest or pre-*Miranda* silence in the government's case-in-chief).

101. *United States v. Hale*, 422 U.S. 171 (1975).

102. *Id.* at 173. In *United States v. Hale*, the defendant was arrested for a robbery, taken into custody, and read his *Miranda* rights. The defendant remained silent as police interrogated him about the crime. At his trial, the defendant testified in his own defense and offered an alibi and other exculpatory testimony. *Id.* at 174. To impeach the defendant's testimony, the prosecution asked him why he had not offered the information to the police at his arrest instead of remaining silent. *Id.*

103. *Id.* at 175. See *supra* notes 15-17 and accompanying text (discussing *Raffel v. United States*, 271 U.S. 494 (1926)).

104. See *id.* at 175 n.4 (noting that the opinion did not reach the constitutional claim); see also *id.* at 176-81 (analyzing the case under rules of evidence).

105. *Id.* at 180.

106. *Doyle v. Ohio*, 426 U.S. 610 (1976).

107. *Id.* at 619. In *Doyle*, a consolidated case, police arrested two defendants on drug charges and read them the *Miranda* warnings. At trial, each defendant offered an exculpatory frame-up story for the first time at trial. *Id.* at 613. To impeach the defendants' testimony, the prosecution asked each defendant why he remained silent instead of telling the frame-up story to the arresting police officers. *Id.* at 612-14.

108. *Id.* at 617. The prosecution argued that its use of the defendant's post-*Miranda* silence was limited to impeach the defendant's exculpatory story first raised at trial. *Id.* at 616. It relied on Supreme Court precedent that allowed the use of post-arrest statements, inadmissible as evidence

the Court continued, “every post-arrest silence is insolubly ambiguous” because the trial court would be unable to discern whether a defendant’s post-arrest silence was induced by *Miranda* warnings (and thus inadmissible) or induced by a defendant’s intent to fabricate later an exculpatory story to use at trial (and thus arguably admissible).¹⁰⁹ *Doyle* held that the use of a defendant’s post-arrest silence would be fundamentally unfair, and thus deprive him of due process.¹¹⁰ The *Miranda* warnings, the Court concluded, implicitly assure a defendant that his silence, including his own prior inconsistent silence, cannot be used against him.¹¹¹

of guilt under *Miranda*, to cross-examine a defendant who offered a contradictory explanation of events at trial. See *id.* at 617 (citing *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), and *Walder v. United States*, 347 U.S. 62 (1954) for the proposition that a defendant’s post-arrest statements may be used to impeach his trial testimony).

109. *Id.* at 617-19 n.8 (citing *Hale*, 422 U.S. at 177).

110. *Id.* at 619. Notably, *Doyle* did not hold that Ohio had violated the defendants’ Fifth Amendment privilege against self-incrimination when it asked the jury to draw an inference of guilt from the defendants’ exercise of their right to remain silent. Thus, while the Fifth Amendment bars the government from commenting on a defendant’s refusal to testify, the due process clause of the Fourteenth Amendment bars the government from commenting on a defendant’s post-*Miranda* silence. *Contra Griffin v. California*, 380 U.S. 609, 613 (1965) (holding Fifth Amendment bars use of a defendant’s refusal to testify at trial).

Justice Stevens, writing for the dissent in *Doyle*, failed to see how the use of the defendant’s silence following a *Miranda* warning violated due process. *Id.* at 625-26 (Stevens, J., dissenting). In his view, a trial court ought to allow a defendant to testify to the reasons inducing his silence; if he remained silent in the wake of a *Miranda* warning because of the implicit assurances of the warning, then due process demands that the court protect his silence. *Id.* at 623-26. If, however, the prosecution develops on cross-examination that the defendant did not remain silent because of the implicit assurances behind the warnings, but instead he remained silent to preserve his later manufactured exculpatory story, then his due process rights are not implicated because the defendant’s silence was not induced by the warnings. *Id.* Silence, Justice Stevens concluded, is not insolubly ambiguous—the *Miranda* warnings were intended to assure a knowing and voluntary waiver of constitutional rights, and were not intended to provide a shield for perjury. *Id.* at 636. Relying on *Raffel v. United States*, 271 U.S. 494 (1926), Justice Stevens noted that the Fifth Amendment only prohibits the use of silence to infer guilt in the prosecutor’s case-in-chief and does not prohibit the prosecution from using silence to impeach a defendant’s testimony after he waives his privilege by testifying in his own behalf. *Doyle*, 426 U.S. at 628, 632-33 n.11 (Stevens, J. dissenting). See also *supra* notes 15-26 (discussing *Raffel v. United States*).

111. *Doyle*, 426 U.S. at 618, 620. *Doyle*, however, did not ban completely the government’s use of a defendant’s post-*Miranda* silence. *Id.* at 620 n.11. The Court explained that “[i]t goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.” *Id.*

Prophetically, four years after *Doyle*, the Court considered this very issue. *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam). In *Anderson v. Charles*, the Court allowed the prosecution to comment on a defendant’s failure after his arrest to assert the same version of events

to which he testified at his trial. *Id.* at 408-09. In *Anderson*, the defendant told one version of his story after his arrest and after police read him the *Miranda* warning, then told an inconsistent version at trial. *Id.* at 405-06. The prosecution inquired about this inconsistency and about the defendant's failure to tell the arresting officers the same story he told at trial. *Id.* at 408. The defendant argued that *Doyle* barred the use of his failure to tell the arresting officers the same exculpatory story he told at trial. *See Charles v. Anderson*, 610 F.2d 417, 418 (6th Cir. 1979), *rev'd*, 447 U.S. 404 (1980). The Sixth Circuit, hearing the state case on a writ of habeas corpus, determined that portion of the prosecutor's cross examination that inquired about the defendant's inconsistent version of events was permissible because it bore on his credibility and not the truth of the exculpatory story. *Id.* at 421. The Sixth Circuit, however, ruled that the prosecutor's inquiry into why the defendant had not offered the same exculpatory story to the arresting officers amounted to a *Doyle* violation because the reasons behind the defendant's failure to tell the arresting officers the same story he told at trial were insolubly ambiguous, and thus violated his right to due process. *Id.* The United States Supreme Court, however, disagreed. *See Anderson*, 447 U.S. at 409 (holding *Doyle* inapplicable to the case at bar). The Court determined that the prosecutor in this case did not comment on the defendant's post-*Miranda* silence, but rather on the defendant's inconsistent statements. *Id.* The prosecutor's questions, the Court concluded, did not burden impermissibly the defendant's right to remain silent, but rather sought to impeach the defendant's prior inconsistent version of events. *Id.* The *Anderson* Court opined that it refused to take such a formalistic understanding of silence, instead allowing the government to impeach a defendant with his post-*Miranda* silence when that silence was intertwined with an exculpatory, yet inconsistent, version of events. *Id.* at 408-09.

Eleven years later, the Court again limited *Doyle* when it ruled that due process is not violated when the government's comment on a defendant's post-*Miranda* silence is quickly cured by the trial court so that the defendant's silence was never "used" to impeach him. *Greer v. Miller*, 483 U.S. 756, 766 (1987). The defendant, Charles Miller, was tried for murder. Miller took the stand in his own defense and offered an exculpatory version of events. The government, in its cross-examination of the defendant, asked Miller why he had not told his version of events to the police at his arrest. *Id.* at 758-59. Miller's attorney objected immediately, the trial court sustained the objection and instructed the jury to disregard the question. A jury found Miller guilty. *Id.* Miller appealed contending that the government's comment on his post-*Miranda* silence was a *Doyle* violation and that the trial court committed reversible error when it refused Miller a mistrial. *Id.* at 759-60. Justice Powell, writing for the majority in *Greer*, first decided that the issue on appeal is determined under *Doyle v. Ohio* because the government commented on the defendant's post-*Miranda* silence. *Id.* at 763. Injecting a formalistic approach into the *Doyle* analysis, the Court concluded that *Doyle* only prohibits the use of a defendant's post-*Miranda* silence, not its mention. *Id.* at 764. Because the trial court, by sustaining the defense's objection and offering an immediate curative instruction to the jury, did not allow the government to use Miller's silence, the government did not violate *Doyle*. *Id.* at 764-65. It seems, then, that the government may violate *Doyle* and comment on a defendant's post-*Miranda* silence so long as that error is harmless.

In an interesting application of *Doyle*, the Supreme Court determined that the government's use of a defendant's post-arrest and post-*Miranda* silence to contradict his insanity plea violated due process. *See Wainwright v. Greenfield*, 474 U.S. 284, 295-96 (1986). In *Wainwright*, the police arrested and *Mirandized* the defendant. In response, the defendant stated that he understood the warnings and requested an attorney. He was read the *Miranda* warnings twice again. *Id.* at 286.

Notably, the *Doyle* Court explained that the prosecutor's use of a defendant's post-*Miranda* silence was prohibited by the Fourteenth Amendment's Due Process Clause and not by the Fifth Amendment's privilege against self-incrimination, even though *Miranda* appears to be sympathetic to an outright constitutional ban on the use of silence.¹¹² In a footnote to its opinion, the *Miranda* Court wrote that the "prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."¹¹³ Although this absolute ban on the use of silence suggests that *Miranda* contemplated prohibiting the use of a defendant's post-*Miranda* silence under the Fifth Amendment, the footnote relies chiefly on *Griffin v. California*, a United States Supreme Court opinion decided one year before *Miranda*.¹¹⁴ In *Griffin*, the Court determined that the Fifth Amendment prohibits comment on a defendant's decision not to testify at his own trial.¹¹⁵ *Griffin* did not contemplate the government's use of a defendant's silence at his arrest to impeach him. It merely explained that the Fifth Amendment bans comment on the defendant's failure to testify.¹¹⁶ The *Doyle* Court, it seems, understood this distinction. *Doyle* determined that the prosecutor's use of a defendant's post-*Miranda* silence implicated the more flexible due process requirements under the Fourteenth Amendment,¹¹⁷ perhaps because the defendants in *Doyle* neither stood mute nor

Each time, the defendant requested to speak with an attorney. *Id.* In its closing argument, the prosecution commented on the defendant's silence on the theory that his post-*Miranda* silence and request for counsel demonstrated a degree of comprehension that was inconsistent with insanity. *Id.* at 287. Relying on *Doyle* and its progeny, the Court reaffirmed that the government is barred from using a defendant's post-*Miranda* silence when it induces that silence through the warnings. *Id.* at 290-91. Use of such silence as evidence of the defendant's sanity, the Court concluded, is fundamentally unfair and thus violates the defendant's right to due process. *Id.* at 295.

112. See *Doyle*, 426 U.S. at 619 (holding that use of post-*Miranda* silence to impeach violated due process); see also *Miranda*, 384 U.S. at 468 n.37 (contemplating absolute ban to the use of silence).

113. *Miranda*, 384 U.S. at 468 n.37.

114. See *id.* (citing *Griffin v. California*, 380 U.S. 609 (1965)).

115. *Griffin*, 380 U.S. at 615. In *Griffin*, both the trial court in its charge to the jury and the prosecution commented on the defendant's failure to testify. *Id.* at 610-11. Justice Douglas, writing for the majority, explained that comment on the accused's refusal to testify is outlawed by the Fifth Amendment because allowing such comment would force a defendant to either invoke his right only to suffer from that choice, or waive it. *Id.* at 614. This choice constitutionally burdens the privilege "by making its assertion costly." *Id.*

116. *Id.* at 615.

117. *Doyle*, 426 U.S. at 619. Justice Stevens, in his *Doyle* dissent, considered whether the defendants' Fifth Amendment privilege against self-incrimination was violated when the prosecutor commented on their post-*Miranda* silence. *Id.* at 626-27 (Stevens, J., dissenting). First, Justice Stevens noted that the defendants failed to invoke their right to remain silent, and one failed to remain silent, at their arrest. *Id.* at 627-28. Since the defendants failed to stand mute or claim the privilege, they cannot rely on footnote 37 in the *Miranda* opinion, which suggests a constitutional

claimed their Fifth Amendment privilege at their arrest, and because the government's use of the defendants' pre-trial silence to impeach them avoided a direct *Griffin*-like Fifth Amendment question.

Reading *Griffin*, *Miranda*, and *Doyle* together, the Court constitutionally distinguishes pre-trial silence used to impeach a defendant, from trial silence used to infer his guilt. Under *Griffin*, any comment on the defendant's failure to testify at his own trial implicates directly the Fifth Amendment prohibition against compelled self-incrimination.¹¹⁸ In *Miranda*, the Court perfected the defendant's Fifth Amendment right to silence by requiring police to first apprise him of his rights before they interrogate him—explaining that the coercive atmosphere of custodial interrogation burdens the defendant's Fifth Amendment right to silence.¹¹⁹ And in *Doyle*, the Court determined that comment on the defendant's post-*Miranda* silence to impeach him at trial sounds in due process because of the implicit assurances embodied in the *Miranda* warning.¹²⁰ Choosing to base its holding on the flexible requirements of due process and not the absolute proscription of the Fifth Amendment, the *Doyle* Court seemed purposefully to leave the door open for some use of silence not contemplated by its opinion.

Four years after *Doyle*, the United States Supreme Court again considered whether the government could use a defendant's inconsistent silence to impeach him at trial.¹²¹ In *Jenkins v. Anderson*, the Court held that the defendant's constitutional rights were not violated when the prosecution, in its cross-examination of the defendant, referred to his pre-arrest silence in an attempt to impeach his credibility.¹²² Indeed, the Court determined that the defendant failed to raise a constitutional claim.¹²³ Relying on *Raffel v. United States*, the Court

ban on the use of silence when a defendant stands mute or claims his privilege in the face of accusation. *Id.* at 627-28. More importantly, Justice Stevens noted that the *Miranda* footnote relied primarily on *Griffin v. California*, 380 U.S. 609 (1965), which determined that a prosecutor's comment on a defendant's failure to testify violates his Fifth Amendment rights. *Id.*; see also *Griffin*, 380 U.S. at 615 (holding that Fifth Amendment forbids comment on the accused's silence when it is used to evidence guilt). Unlike *Griffin*, the prosecutor in *Doyle* did not comment on the defendants' failure to testify, but commented on their failure to tell the arresting officers their exculpatory story first heard at trial. *Doyle*, 426 U.S. at 613. As such, *Doyle* is best understood as a *Raffel*-type impeachment case, rather than a *Griffin*-type self-incrimination case.

118. See *supra* note 115 and accompanying text (discussing *Griffin v. California*).

119. See *supra* notes 56-59 and accompanying text (discussing *Miranda v. Arizona*).

120. See *supra* note 107 and accompanying text (discussing *Doyle v. Ohio*).

121. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

122. *Id.* at 240. The petitioner, Dennis Jenkins, confessed to murder two weeks after the crime, alleging that he killed in self defense. *Id.* at 232-33. At his trial, Jenkins testified in his own defense. The prosecution, in its cross-examination of Jenkins, asked him why he remained silent for two weeks after the crime, intending to raise an inference that Jenkins' silence was inconsistent with his later confession. *Id.* at 233-35. Jenkins argued that the prosecution violated his Fifth Amendment right to remain silent. *Id.* at 235.

123. *Id.* at 238-39.

confirmed that a defendant waives his Fifth Amendment right to remain silent when he testifies in his own defense and the government attempts to use his prior silence to impeach his credibility.¹²⁴ Although the *Jenkins* Court submitted, *in arguendo*, that its ruling may force a person to choose between invoking his right to remain silent thereby risking the use of his pre-arrest silence to impeach him and waiving his right to silence to prevent the government from using his pre-arrest silence to impeach him later, it opined that the “Constitution does not forbid ‘every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.’”¹²⁵ The Court differentiated *Jenkins* from *Doyle*, where the government induced the defendant to remain silent because his silence followed the government’s assurance that his silence would not be used against him.¹²⁶ In *Jenkins*, the defendant never received a *Miranda* warning—nor was he entitled to one—and thus never received the government’s assurance that his silence would not be used against him.¹²⁷ Pre-arrest (and pre-*Miranda*) silence, then, can be used to impeach a

124. *Id.* at 235.

125. *Id.* at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). Determining whether a constitutional right has been impermissibly burdened, the Court stated that “[t]he ‘threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.’” *Id.* (quoting *Chaffin*, 412 U.S. at 32). The Court also considered whether the challenged governmental practice (using a person’s pre-arrest silence to impeach his credibility at trial) furthers other important purposes. *Id.* at 238. Weighing these policies, the Court concluded that the government’s use of a person’s pre-arrest silence does not appreciably impair the policies behind the Fifth Amendment and does further the important goal of enhancing the reliability of the criminal process. *Id.* at 236-38.

126. *Id.* at 239-40.

127. *Id.* at 240. In his concurrence, Justice Stevens argued that the Fifth Amendment privilege against self-incrimination is irrelevant to a person’s decision to remain silent when she is under no official compulsion to speak. *Id.* at 241 (Stevens, J., concurring). The admissibility of pre-arrest silence, then, turns on the rules of evidence and not the Constitution. *Id.* at 244.

Justice Marshall, however, in his dissent, wrote that the majority’s ruling has three defects. *Id.* at 246 (Marshall, J., dissenting). First, Justice Marshall would extend *Doyle* to prohibit the use of pre-arrest silence to impeach a defendant, because like post-arrest silence, pre-arrest silence “is so unlikely to be probative of the falsity of the defendant’s trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment.” *Id.* (Marshall, J., dissenting); *see also supra* notes 106-08 (discussing use of post-arrest silence in *Doyle*). A defendant, Justice Marshall noted, may have decided to exercise his constitutional right to remain silent before his arrest—his silence is indeterminately ambiguous because it cannot be assumed that he is not aware of his constitutional rights, even prior to an official warning. *Id.* at 247. Second, Justice Marshall argued that allowing the prosecution to draw a negative inference from a defendant’s silence impermissibly penalizes the defendant’s decision to exercise his privilege against self-incrimination under the Fifth Amendment. *Id.* at 246. To prevent the prosecution from drawing a negative inference from his pre-arrest silence, a defendant would be required to offer his potentially incriminating version of events to the police—replacing “the privilege against self-incrimination with a duty to incriminate oneself.” *Id.* at 250 (Marshall, J.

defendant's credibility when he waives his Fifth Amendment privilege by agreeing to testify at his own trial and in his own defense. The use of post-arrest (and post-*Miranda*) silence, however, is fundamentally unfair and violates the due process guarantee of the Fourteenth Amendment because the government assured the defendant that his silence would not be used against him.¹²⁸

The *Miranda* decision, however, addressed the constitutionality of the government's use of a defendant's confession obtained through a custodial interrogation.¹²⁹ That opinion did not consider the use of a defendant's statements (or silence) absent the coercive environment surrounding a police interrogation or its functional equivalent. *Miranda*'s progeny, including both *Doyle* and *Jenkins*, ostensibly moved *Miranda*'s constitutional trigger away from police interrogation, and the question became not whether the suspect was interrogated, but whether the government induced his silence. The problem was fixing when, and not whether, the government induced a defendant's silence.

In the wake of *Jenkins*, some federal appellate courts determined that the arrest itself triggered a suspect's right to remain silent (and prohibited the government's use of his silence to impeach him), regardless of whether he was even read the *Miranda* warnings.¹³⁰ For example, in *Weir v. Fletcher*, the United States Court of Appeals for the Sixth Circuit determined that the government could not impeach a defendant with his post-arrest silence even if the police

dissenting). To support this view, Justice Marshall concluded that the majority's reliance on *Raffel* was misguided because *Raffel*, although not expressly overruled, was no longer viable in the wake of *Griffin*. *Id.* at 252. Third, Justice Marshall further opined that allowing the prosecution to draw a negative inference from a defendant's pre-arrest silence would impermissibly burden the defendant's choice to testify in his own defense. *Id.* at 246 (Marshall, J. dissenting). In the paradigmatic case, a defendant would need to report his exculpatory story "at the first possible moment" to prevent the prosecution from later commenting on his pre-arrest silence to discredit his trial testimony should he choose to exercise his constitutional right to testify on his own behalf. *Id.* at 253.

128. Notably, the *Jenkins* Court appears to reinforce an idea first articulated in *Johnson v. United States*, 318 U.S. 189 (1943). In that case, the Court determined that when a trial court expressly grants a defendant's request to remain silent, even if that defendant makes the request after he waives his right and during his own cross-examination, it must honor its own grant. *See supra* notes 28-39 and accompanying text (discussing *Johnson v. United States*). In *Jenkins*, the Court again suggested that a defendant who waives his privilege against self-incrimination and testifies in his own defense may still invoke his right to protect his post-*Miranda* silence because the government assured him that his silence will carry no penalty. *See Jenkins v. Anderson*, 447 U.S. 231, 240 n.6 (1980).

129. *See supra* notes 79-86 (discussing *Miranda*).

130. *Weir v. Fletcher*, 658 F.2d 1126, 1131 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982) (concluding that impeachment of defendant with post-arrest silence is unconstitutional); *see also* *United States v. Curtis*, 644 F.2d 263, 271 (3d Cir. 1981) (holding use of post-arrest silence constituted *Doyle* error without regard to *Miranda* warnings); *United States v. Harrington*, 636 F.2d 1182, 1187 (9th Cir. 1980) (holding that the use of post-arrest silence to impeach unconstitutional without regard to *Miranda* warnings).

never read him the *Miranda* warnings.¹³¹ Relying on both *Doyle* and *Jenkins*, the Sixth Circuit ruled that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent."¹³² Perhaps recognizing that its *Miranda* opinion was growing increasingly slippery, the United States Supreme Court accepted certiorari in *Fletcher v. Weir* and decided, per curiam, that the *Miranda* warnings, and not the arrest, determine whether the government can permissibly impeach a defendant with his own silence.¹³³

In *Fletcher*, the defendant testified for the first time at his murder trial that he acted in self defense.¹³⁴ The government, in its cross examination of the defendant, asked him why he failed to offer his exculpatory story to the arresting officers both prior to and immediately after his arrest.¹³⁵ The court noted that it could not determine whether the defendant had been read the *Miranda* warnings before his post-arrest silence.¹³⁶ Reversing the Sixth Circuit, the Court first concluded that a defendant's pre-arrest silence is admissible to impeach him because no government action (a *Miranda* warning) induced the defendant to remain silent before his arrest.¹³⁷ Secondly, the Court determined that the government could use a defendant's post-arrest yet pre-*Miranda* silence, because, absent the affirmative assurances embodied in a *Miranda* warning, the government's use of that silence to impeach him does not offend due process.¹³⁸

131. *Weir*, 658 F.2d at 1130. In *Weir v. Fletcher*, the defendant testified at his murder trial that he acted in self-defense. *Id.* at 1127. The prosecutor, in his cross-examination of the defendant, asked the defendant why he had not disclosed his exculpatory story to the police at the time of his arrest. *Id.* at 1128-29. The court held that the prosecutor's questions about the defendant's silence before his arrest were permissible. *See id.* at 1129 (relying on *Jenkins v. Anderson*, 447 U.S. 231 (1980)). The court also held that the prosecutor's questions about the defendant's post-arrest, yet pre-*Miranda* silence were impermissible. *See id.* (limiting *Jenkins* to pre-arrest silence).

132. *Id.* at 1131.

133. *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam).

134. *Id.* at 603.

135. *Id.* at 604 n.1.

136. *Id.* at 605.

137. *Id.* at 606. The Court relied first on *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), which held that the government could not use a defendant's post-arrest and post-*Miranda* silence to impeach him because the defendant's silence may have been induced by the government's assurances that his silence would not be used against him. *See Fletcher*, 455 U.S. at 605 (discussing *Doyle v. Ohio*). The Court then discussed its ruling in *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), where it held that the government could impeach a defendant with his pre-arrest silence because the defendant had not yet received assurances that his silence would not be used against him. *Fletcher*, 455 U.S. at 606 (discussing *Jenkins v. Anderson*). Finally, the Court relied on *Anderson v. Charles*, 447 U.S. 404, 408 (1980), where it reasserted the idea that silence following a *Miranda* warning cannot be used to impeach a defendant because the warning assured the defendant that his silence would not be used later against him. *See Fletcher*, 455 U.S. at 606 (discussing *Anderson v. Charles*).

138. *Id.* at 606-07. Instead, the Court concluded that the admissibility of a defendant's post-arrest, pre-*Miranda* silence is controlled by the rules of evidence, not the Constitution. *Id.* at 606.

A defendant's right to remain silent, then, is triggered not by his arrest, but by the arresting officer's decision to *Mirandize* him. The constitutional trigger for the admissibility of exculpatory statements (or silence), once keyed to the dangers inherent to back-door interrogations, now rests in part on the speed at which an arresting officer can apprise a suspect of his rights.¹³⁹ And while the defendant's due process right is perfected when he relies on the assurances implicit in the warnings, the government has no obligation to *Mirandize* anyone absent custody.¹⁴⁰ Even when a suspect is in custody, the government can still use his silence to impeach him if the police fail to *Mirandize* him immediately upon his arrest.¹⁴¹

In the end, *Miranda* and its progeny both deepened and broadened a suspect's rights under the Constitution. The Fifth Amendment requires the government to first warn a suspect in custody of the dangers of waiving his constitutional rights. Although the government's use of a defendant's post-*Miranda* silence to impeach him may not infringe directly on his Fifth Amendment rights, it will violate his right to due process under the Fourteenth Amendment. In the paradigmatic case, the Fifth Amendment requires the government to warn a person in custody (or its functional equivalent) of the dangers of waiving Fifth Amendment rights. But, while the warnings are derived

139. See *supra* note 73 (discussing custodial interrogation as the reason for the *Miranda* warnings).

140. See *supra* notes 77-80 (discussing the requirement of custody). In 1983, the Supreme Court reasserted, in a per curiam opinion, that a suspect is entitled to a *Miranda* warning only when he is in custody and that custody begins with an arrest or something similar to an arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). In *Beheler*, the defendant called the police shortly after his brother-in-law committed a murder. *Id.* at 1122. Later, Beheler voluntarily accompanied police to the station house where he agreed to talk about the murder. The police interviewed Beheler without first apprising him of his rights. At trial, the trial court admitted Beheler's statements into evidence. *Id.* Weighing the totality of the circumstances surrounding the interview, the court of appeals determined that the government failed to meet its burden by showing that Beheler was not in custody during the interview. *Id.* at 1123. Ultimately, the Supreme Court disagreed with the court of appeals' determination, stating that the government is required to give a *Miranda* warning only when it formally arrests a suspect or restricts his freedom of movement to a degree associated with formal arrest. *Id.* at 1125. Because police in this case neither arrested Beheler nor restricted his movement in a significant way, he was not in custody during the interview—and thus was not entitled to a *Miranda* warning. *Id.* An arrest, or something analogous to an arrest, then, entitles a person to the warnings which, once given, assure a person that his silence cannot be used against him.

141. The Supreme Court has stated that a custodial interrogation activates the need for *Miranda* warnings. See *id.* at 1122-23. The *Miranda* warning, however, determines the admissibility of a defendant's silence at trial. In a more recent test, the United States Supreme Court restated in *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993), that the government could comment on a defendant's pre-*Miranda* silence to impeach him, but that the government could not comment on a defendant's post-*Miranda* silence to impeach him without violating the defendant's due process rights.

from the Fifth Amendment, the Constitution is only breached when the government compels a defendant to bear witness against himself. Once warned, a defendant may waive his right by either subjecting himself to police interrogation or by testifying on his own behalf at trial. Should the defendant choose to remain silent after he is warned, however, the government's use of that silence, even to impeach, is barred not by the Fifth Amendment (because it only protects compelled statements), but rather by the Fourteenth Amendment (because due process demands that the government honor its promises to the suspect).

The case law teaches that the government's use of a suspect's silence to impeach him may sound in the Fifth Amendment, but its admissibility at trial is determined under the Fourteenth Amendment.¹⁴² And while the United States Supreme Court attended to the government's use of a defendant's silence to impeach his credibility after he waives his right to not incriminate himself, the lower courts struggled with the more precarious question of whether the government can use a defendant's pre-trial silence in its case-in-chief. The debate turns on the reach of the Fifth Amendment's prohibitions and whether the Fifth Amendment applies at all to pre-trial, yet arguably incriminating silence.

IV. THE CIRCUITS RESPOND: THE USE OF SILENCE IN THE GOVERNMENT'S CASE-IN-CHIEF

Since *Raffel v. United States*, the Supreme Court's jurisprudence has evolved to permit the government's use of a suspect's pre-trial silence to impeach him only if that silence preceded the implied assurance embodied in *Miranda* that silence would carry no penalty.¹⁴³ But for *Miranda* warnings, no government action induces a suspect to remain silent, so the use of that silence to impeach a defendant violates neither the Fifth Amendment's prohibition against self-incrimination nor the Fourteenth Amendment's fundamental fairness test under a due process analysis.¹⁴⁴ Some circuits have found that, because the *Doyle/Jenkins* analysis allows the government to use a defendant's prior silence against him at trial, no doctrinal basis exists to distinguish between the government's use of a defendant's silence to impeach him and the government's use of a defendant's silence to evidence his guilt.¹⁴⁵ Other circuits, however,

142. See *supra* notes 112-15 and accompanying text (discussing the application of the Fifth Amendment to the admissibility of a defendant's silence).

143. See *supra* notes 106-11 and accompanying text (discussing *Doyle v. Ohio* and its progeny). Any comment on the defendant's silence at trial (when the government comments on his refusal to testify), however, is barred by the Fifth Amendment. See *supra* notes 115-16 and accompanying text (discussing *Griffin v. California*).

144. See *supra* notes 127-28 and accompanying text (discussing the use of a defendant's pre-*Miranda* silence to impeach him).

145. The Fifth, Ninth, and Eleventh Circuits have all held that the government may use pre-arrest silence in its case-in-chief. *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding government may use pre-arrest silence in its case-in-chief); *United States v. Zanabria*, 74

disagree.¹⁴⁶

A. Federal Circuit Courts of Appeal Concluding That the Government May Not Use a Defendant's Silence in Its Case-in-Chief

Seven circuits have considered whether the government could use a suspect's pre-arrest or pre-*Miranda* silence to establish (or at least infer) the defendant's guilt and have determined that such use is prohibited by the Constitution.¹⁴⁷ For example, in *Coppola v. Powell*, the United States Court of Appeals for the First Circuit concluded that the government's use of a defendant's pre-arrest silence in its case-in-chief unconstitutionally burdened his Fifth Amendment privilege against self-incrimination.¹⁴⁸ In *Coppola*, the police, during a criminal investigation, questioned a suspect but had not yet arrested nor *Mirandized* him.¹⁴⁹ The suspect, when asked about the crime, replied "if you think I'm going to confess to you, you're crazy."¹⁵⁰ At trial in New Hampshire, the government successfully sought to admit the fact that the defendant refused to speak.¹⁵¹ On appeal, the New Hampshire Supreme Court affirmed, agreeing with the trial court that the defendant had not invoked his Fifth Amendment right to silence.¹⁵² On appeal from a federal district court's denial of the defendant's writ of habeas corpus, the First Circuit disagreed with both the New Hampshire Supreme Court and the federal district court when it determined first that the suspect did invoke his Fifth Amendment privilege against self-incrimination when he refused to confess to police.¹⁵³ Then, relying on *Griffin v. California*, the court explained

F.3d 590 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).

146. See *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding pre-arrest silence cannot be used in the government's case-in-chief); *United States ex. rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987) (holding government cannot use pre-arrest silence in its case-in-chief); *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (suggesting government cannot comment on a defendant's silence in its case-in-chief).

147. See *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000); *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997); *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991); *Coppola*, 878 F.2d at 1562; *Savory*, 832 F.2d at 1011; *Caro*, 637 F.2d at 869; *Douglas v. Cupp*, 578 F.2d 266 (9th Cir. 1978).

148. *Coppola*, 878 F.2d at 1567-68.

149. *Id.* at 1563.

150. *Id.*

151. *Id.* at 1564.

152. See *id.* (citing *State v. Coppola*, 130 N.H. 148, 152-53 (1987)). The New Hampshire Supreme Court explained that the defendant failed to invoke any Fifth Amendment privilege against self-incrimination because he did not refuse to speak or remain silent (and therefore invoke his constitutional right), but rather refused to confess. *Id.*

153. *Id.* at 1567. The court cited three reasons to support the idea that a defendant invokes his right to remain silent when he refuses to confess, rather than when he refuses to speak. *Id.* at 1564-1566. First, the court explained that the United States Supreme Court construes broadly a defendant's invocation of his right to remain silent. *Id.* at 1565. Second, the court determined that

that the Fifth Amendment bars comment on a person's exercise of his Fifth Amendment privilege against self-incrimination when he elects not to testify in his own defense.¹⁵⁴ *Jenkins v. Anderson*, the court continued, was inapplicable because that case considered whether the Fourteenth Amendment allows the government to impeach a defendant with his pre-*Miranda* silence and did not consider whether the Fifth Amendment prohibits comment on a defendant's claim of his Fifth Amendment right to remain silent (and his subsequent silence) before his arrest.¹⁵⁵ Notably, the *Coppola* court did not consider whether the flexible requirements of the Fourteenth Amendment allow the government to comment on a defendant's pre-arrest or pre-*Miranda* silence, but rather focused on whether the defendant invoked his Fifth Amendment privilege during an investigatory proceeding, thereby barring the government from using his silence against him. In evaluating such claims, courts have first uncovered some indication that a defendant had invoked his rights under the Fifth Amendment and then simply barred that invocation together with any attendant silence as an unconstitutional burden on the Fifth Amendment.

The Sixth Circuit unwittingly agreed with the First Circuit's rule in *Coppola* when it decided *Combs v. Coyle*.¹⁵⁶ In *Combs*, an Ohio trial court convicted the defendant, Ronald Combs, of murdering his former girlfriend and her mother.¹⁵⁷ At trial, the prosecution used Combs' pre-arrest silence to establish that he intended to commit the crime charged.¹⁵⁸ Of note, Combs told the investigating officer to "talk to [my] lawyer."¹⁵⁹ Combs was neither under arrest, nor read the *Miranda* warnings at the time.¹⁶⁰ The defendant appealed his conviction, arguing that the prosecution violated his right to due process under *Doyle v. Ohio* when it allowed the government to comment on his pre-arrest silence in its case-in-

"a claim of the [Fifth Amendment privilege against self-incrimination] does not require any special combination of words." See *id.* (quoting *Quinn v. United States*, 349 U.S. 155, 162 (1955)). Finally, the court noted that the privilege is not limited to persons in custody or charged with a crime and applies to suspects under investigation of a crime. *Id.* at 1565-66.

154. *Id.* at 1568. The court noted that had the defendant surrendered his privilege against self-incrimination and testified in his own defense, then the rule of *Raffel v. United States* would have allowed the prosecution to comment on his Fifth Amendment privilege. *Id.* at 1567-68.

155. *Id.* at 1568.

156. *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000).

157. *Id.* at 273.

158. *Id.* at 278-79. At the defendant's trial, an officer who witnessed the murders testified that he asked the defendant what had happened, and the defendant replied "talk to my lawyer." *Id.* at 279. The trial court immediately followed with an instruction to the jury reminding it that the defendant had a right to remain silent, but still allowed the jury to consider the testimony for the purpose of determining the defendant's intent. In its closing speech, the prosecutor again noted to the jury that the defendant chose not to answer the officer's question, instead asking for a lawyer. The Sixth Circuit determined that the defendant's request for his lawyer "is best understood as communicating a desire to remain silent outside the presence of an attorney." *Id.*

159. *Id.*

160. *Id.* at 280.

chief.¹⁶¹

Although the Sixth Circuit disagreed with Combs' reliance on *Doyle* because he was never read the *Miranda* warnings and thus could not have relied on a government assurance that his silence would not be used against him, it did conclude that the Fifth Amendment bars the government from using a defendant's pre-arrest silence as substantive proof of guilt.¹⁶² Notably, the court determined that "Combs clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer."¹⁶³ The court also suggested that a person questioned in the course of a criminal investigation may assert his Fifth Amendment privilege against self-incrimination to the same extent as a person charged with a crime or in custody.¹⁶⁴ Then, to hedge its bet, the court determined that even if the privilege does not apply in the pre-custody context, Combs was under arrest and in custody when he told the investigating officers to talk to his lawyer.¹⁶⁵ The court reasoned that because Combs invoked his privilege at the outset of the police investigation, never waived his privilege during the criminal proceeding, and did not testify at his trial, the government could not comment on his silence without offending his Fifth Amendment privilege against self-incrimination.¹⁶⁶ Like the First Circuit, the Sixth Circuit did not object explicitly to the government's use of a defendant's pre-arrest silence in its case-in-chief, but rather to the government's use of his silence after he invoked his right to remain silent and continued to benefit from its protection by choosing not to testify in his own defense.

The Seventh Circuit appears to agree with this analysis.¹⁶⁷ In *Savory v. Lane*, the United States Court of Appeals for the Seventh Circuit concluded that the government may not use a defendant's pre-arrest silence in its case-in-chief.¹⁶⁸ In *Savory*, the prosecution introduced evidence that the defendant refused to make a statement when police initially interviewed him in connection with a

161. *Id.* at 279.

162. *See id.* at 280, 286 (noting that *Doyle* rests on the theory that the *Miranda* warnings implicitly assure a defendant that his silence will not be penalized).

163. *Id.* at 286.

164. *See id.* at 283 (citing *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989)).

165. *Id.* at 284-85. The court observed Justice Stevens's concurrence in *Jenkins* when he explained that the Fifth Amendment does not apply in the pre-custody context because without arrest or custody a person is under no official compulsion to speak or remain silent—so the Fifth Amendment's prohibition against compelled self-incrimination is inapplicable. *Id.* at 283 (citing *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). The court, anxious that Justice Stevens may be right, wrote that "[e]ven assuming that the Fifth Amendment is inapplicable to precustody contexts, the privilege would still be applicable to Combs, for we agree . . . that Combs was in custody at the time he made the 'talk to my lawyer' statement." *Id.* at 284.

166. *Id.* at 285.

167. *See United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (holding use of defendant's pre-arrest silence violated the Fifth Amendment).

168. *See id.* at 1018-19 (holding that although the Fifth Amendment bars the use of a defendant's pre-arrest silence in the government's case-in-chief, the error was harmless).

murder investigation.¹⁶⁹ The defendant did not take the stand at his trial.¹⁷⁰ The Seventh Circuit concluded that the government's use of the defendant's pre-arrest silence in its case-in-chief did not violate *Doyle v. Ohio* (because the prosecution was not attempting to impeach the defendant), but rather violated *Griffin v. California* (because the prosecution used the defendant's silence to suggest that he was guilty).¹⁷¹ Explaining that the right to remain silent attaches before the institution of formal adversary proceedings, the court wrote "we believe *Griffin* remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest."¹⁷² Although the court neglected to note in its

169. *Id.* at 1015.

170. *Id.* at 1017.

171. *See id.* (citing *Doyle v. Ohio*, 426 U.S. 610 (1976); *Griffin v. California*, 380 U.S. 609 (1965)).

172. *Id.* at 1017. While *Griffin* involved the use of a defendant's refusal to testify in his own defense and not the use of a defendant's pre-arrest silence, the Seventh Circuit did not believe that such a distinction made a difference since the right to remain silent attaches before the institution of formal adversary proceedings. *Id.*

Four years after *Savory v. Lane*, the Seventh Circuit in *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), appeared more sympathetic to the idea that a defendant's pre-arrest silence could be used in the government's case-in-chief. In *Davenport*, IRS agents interviewed two defendants in relation to a bank deposit structuring scheme that violated federal law. *Id.* at 1171. Although the defendants were *Mirandized*, they were neither under arrest nor in custody. *Id.* at 1174. At the pre-arrest interview, one defendant answered some questions and refused to answer others. *Id.* at 1173-74. Later, at trial, the government used the defendant's refusal to answer some of the I.R.S. agent's questions against her. *Id.* at 1175. The Seventh Circuit wrote that despite the ruling in *Savory*, the use of the defendant's pre-arrest silence may not have violated the Constitution in this case. *Id.* It distinguished *Savory*, noting in that case the defendant remained silent throughout the investigatory interview, while the defendants in *Davenport* did answer some questions. *Id.* at 1174. To that end, the court suffered to explain that had the defendants remained silent for the entire interview, the government could not have commented on that silence. *Id.* at 1175. But, because the defendants answered *some* questions, they waived their privilege, and "all bets were off." *Id.* The court noted that absent custody, the prohibitions outlined in *Miranda v. Arizona* are not in play. *Id.* The fact that a defendant answers "some questions can properly be given greater weight in deciding whether that willingness [to answer some questions] should forfeit the right to object to comment on a refusal to answer a particular question." *Id.* Yet, despite the fact that the *Davenport* defendants were read the *Miranda* warnings (and thus implicitly assured that their silence would not be used against them) and despite the Seventh Circuit's holding in *Savory v. Lane* (prohibiting the use of silence in the government's case-in-chief), the court was willing to allow the government to use the defendants' pre-arrest silence against them. Not entirely confident in its own ruling, however, the court finally determined that "if this is all wrong and there was error here, it was harmless." *Id.* *Davenport* can only then be read as an anomaly and a case of result-oriented jurisprudence.

One year later, the Seventh Circuit resolved any ambiguity about the circuit's position on the use of pre-*Miranda* silence when it decided *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991). In *Hernandez*, the defendant objected to the prosecution's use of his post-arrest yet pre-

reasoning that the defendant had in fact asserted his right to remain silent when he refused to give investigating officers a statement (arguably triggering his Fifth Amendment privilege against self-incrimination under *Griffin*), that fact was key to both the First and Sixth Circuits.¹⁷³ Another federal circuit, then, appears to prohibit the use of pre-arrest silence in the government's case-in-chief when the defendant asserts his right to remain silent before he is owed the *Miranda* warnings and even before his arrest.

The Tenth Circuit Court of Appeals also considered whether the government could use a defendant's pre-arrest silence in its case-in-chief and agreed with the First, Sixth, and Seventh Circuits when it concluded that the government may not comment on a defendant's pre-arrest silence without offending the Fifth Amendment.¹⁷⁴ In *United States v. Burson*, the petitioner, Cecil Burson, was convicted for tax evasion.¹⁷⁵ At trial, the prosecuting attorney produced two IRS criminal investigators who testified that Burson had not responded to their investigatory questions at his home and that "it was apparent that he would not cooperate or answer any . . . questions."¹⁷⁶ The court concluded first that Burson had invoked his privilege against self-incrimination when he remained silent in the face of investigatory questioning by the IRS agents.¹⁷⁷ Then, relying on a broad construction of *Griffin v. California*, it determined that once a defendant invokes his privilege against self-incrimination, the Fifth Amendment prohibits the prosecution from commenting on his protected silence.¹⁷⁸ Under the Tenth Circuit's analysis, silence alone may invoke a person's right to silence even in the absence of any official compulsion to speak. Once again, a federal circuit court of appeals was able to prevent the government from using a person's pre-arrest and pre-*Miranda* silence in its case-in-chief if that person first asserted (or even implied) his right to remain silent during an investigation of a crime.¹⁷⁹

Miranda silence in its case against him. *Id.* at 322. The trial court admitted the silence. *Id.* Relying on *Savory v. Lane*, the Seventh Circuit determined that the government cannot use a defendant's pre-*Miranda* silence as evidence of guilt in its case-in-chief. *See id.* at 322-23.

173. *Savory*, 832 F.2d at 1015 (noting that defendant asserted his right to remain silent, but outside its analysis of the case); *see also supra* notes 148-66 and accompanying text (discussing the First and Sixth Circuits' focus on the defendant's assertion of the right to remain silent).

174. *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991).

175. *Id.* at 1198.

176. *Id.* at 1200.

177. *Id.* at 1200-01. The court noted that Burson's silence in the face of investigatory questions was sufficient to invoke his Fifth Amendment privilege against self-incrimination. *Id.* at 1200.

178. *Id.* at 1201; *see also supra* notes 115-16 and accompanying text (discussing *Griffin*'s prohibition against the use of a defendant's failure to testify at his trial, not before).

179. *Id.* Ten years after its opinion in *United States v. Burson*, the Tenth Circuit again considered the admissibility of a defendant's pre-trial silence and concluded that, in some scenarios, the prosecution may comment on defendant's silence without offending the Constitution. *United States v. Oliver*, 278 F.3d 1035, 1039 (10th Cir. 2001). In *Oliver*, the prosecution, in its case-in-chief, asked its witness, the arresting officer, whether the defendant was read his *Miranda* rights.

Other federal circuits have barred the government's use of a suspect's pre-*Miranda* or pre-arrest silence in its case-in-chief even when a suspect fails to assert, or even imply, his right to remain silent.¹⁸⁰ For example, the Second

The prosecuting attorney then inquired whether the defendant exercised his right to remain silent. The defendant objected to the question before the officer could answer it. *Id.* Relying on *Greer v. Miller*, 483 U.S. 756 (1987), the Tenth Circuit determined that the government did not "use" the defendant's assertion of his *Miranda* rights because the officer was not allowed to answer the prosecutor's question. *Oliver*, 278 F.3d at 1039-40. Further, the court concluded that the government commits a *Doyle* violation when it uses the defendant's right to remain silent against him. *Id.* at 1039. So, while *Burson* teaches that any silence after a defendant asserts his right to remain silent is barred by the Fifth Amendment, *Oliver* suggests that the Fourteenth Amendment, as applied in *Doyle*, does not prohibit comment on silence if that comment did not constitute a "use" of a defendant's right to remain silent.

180. See *infra* notes 181-86 and accompanying text (discussing *United States v. Caro*, 637 F.2d 869 (2d Cir. 1981)); see also *United States v. Moore*, 104 F.3d 377, 389-90 (D.C. Cir. 1997) (holding government may not use post-arrest silence in its case-in-chief, but concluding that error was harmless). In 1997, the United States Court of Appeals for the District of Columbia, in a plurality opinion, relied on *Griffin v. California*, 380 U.S. 609, 615 (1965), to conclude that the government may not comment on a defendant's post-arrest silence in its case-in-chief even when a defendant fails to invoke his right to remain silent. *Moore*, 104 F.3d at 385-86 (noting that police testified that defendant stood mute when contraband was found in his car). Judge Sentelle, writing for the majority, found first that the government commented on the defendant's silence when he was in custody, and not before. *Id.* at 387. As such, the government was barred from using that silence in its case-in-chief. Judge Sentelle explained that the Supreme Court's decisions in *Doyle*, *Jenkins*, and *Fletcher* serve as an exception to an exception to the general rule—the government may only use a defendant's post-custody (yet pre-*Miranda*) silence if the defendant waives his privilege against self-incrimination and testifies in his own defense, and the government uses the defendant's prior silence only to *impeach* his testimony. *Id.* Since the case fell outside the exception to the general rule barring the use of silence, Judge Sentelle wrote that the government may not constitutionally comment on the defendant's silence. *Id.* at 389. The court expressly refused to consider whether pre-arrest silence could be used in the government's case-in-chief, deciding that the facts before it precluded such a consideration. *Id.* at 388.

Judge Silberman, in his concurring opinion, disagreed with Judge Sentelle's Fifth Amendment analysis and accused the majority of "impermissible appellate factual finding." *Id.* at 391 (Silberman, J., concurring). Judge Silberman took sharp exception to Judge Sentelle's finding that the defendant was in custody during his contested silence, writing that the circumstances surrounding the defendant's silence were not the product of compulsion required by the Fifth Amendment. *Id.* at 392-93 (noting that *Miranda v. Arizona* stated that the Fifth Amendment is triggered by the compulsion inherent in a custodial interrogation). Judge Silberman also suggested that the majority's reliance on *Griffin v. California* is misguided since that case barred the government from commenting on a defendant's refusal to testify *at trial*—it did not broaden the Fifth Amendment to protect a defendant's pre-trial silence. *Id.* at 394. Finally, Judge Silberman noted that *Doyle* did not announce a Fifth Amendment prohibition to the use of a defendant's post-*Miranda* silence to impeach him, but rather a due process prohibition under the Fourteenth Amendment. *Id.* at 394-95. The logic of *Doyle*, which prohibited the use of silence only when the

Circuit, in *United States v. Caro*, held that the government may not comment on a defendant's pre-arrest silence in its case-in-chief.¹⁸¹ In *Caro*, the prosecuting attorney, in its direct case, elicited testimony from a customs inspector that the defendant stood mute while the inspector searched his suitcase and found counterfeit Federal Reserve notes in the course of a routine customs inspection.¹⁸² The defendant later waived his Fifth Amendment privilege, denied on direct examination any knowledge of the counterfeit notes, and testified that he was shocked when he saw the inspector remove them from the suitcase.¹⁸³ Concluding that the Fifth Amendment barred the use of the defendant's pre-arrest and pre-*Miranda* silence, the Second Circuit chose not to analyze the case before it and instead relied on the want of federal precedent allowing the use of silence in the government's case-in-chief.¹⁸⁴ It noted that "we are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."¹⁸⁵ A criminal suspect in the Second Circuit who stands mute in the face of a routine investigation, who fails to assert (or imply) his right to remain silent, who waives his right to silence by testifying in his own defense, and who offers an exculpatory version of events surrounding the initial investigation may still rely on the Constitution to protect his pre-arrest silence.¹⁸⁶

police first assure the defendant that his silence would not be used against him, ought to apply equally to the use of silence to impeach as to the use of silence to demonstrate guilt. *Id.* at 395. As such, Judge Silberman would have allowed the prosecution to comment on the defendant's pre-*Miranda* silence in its case-in-chief since that silence was not compelled by the police, was not induced by a *Miranda* warning, and was not barred by the Fifth or Fourteenth Amendments. *Id.*

181. *Caro*, 637 F.2d at 876.

182. *Id.* at 871. The court noted that the only substantial issue for trial was whether the defendant knew the suitcase contained counterfeit notes. In its direct case, the prosecution attempted to infer guilty knowledge from the defendant's reaction to the inspector's search of the suitcase. *Id.*

183. *Id.* at 872.

184. *Id.* at 876. The court stated it "found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case." *Id.*

185. *Id.*

186. *Id.* The court did state that had the government commented on the defendant's pre-arrest silence after the defendant offered an exculpatory version of events, then the government would be allowed to rebut the defendant's version of facts with his prior silence. *Id.* at 875.

Interestingly, a few months after the Second Circuit decided *Caro*, a United States District Court in the Second Circuit concluded in *United States v. Robinson*, 523 F. Supp. 1006, 1012 (1981), that the prosecution may comment on a defendant's pre-arrest silence in its case-in-chief. In *Robinson*, a district court considered an appeal from a federal magistrate's finding, alleging that the defendant's Fifth Amendment right to remain silent was violated when the magistrate considered his pre-arrest silence to determine his guilt. *Id.* at 1009. In *Robinson*, the prosecutor introduced testimony that the defendant was silent when asked by a court cashier to give her some "real money" after he tried to pass counterfeit notes to pay a court fine. *Id.* at 1007. In its

Generally, the circuits that bar the government from using a defendant's silence in its case-in-chief advance three reasons to support their conclusions. First, these circuits have determined that a suspect may assert his Fifth Amendment right to remain silent well before trial and perhaps even before his arrest. This idea is based on a broad construction of the United States Supreme Court's opinion in *Griffin v. California*, which concluded that the Fifth Amendment only prohibits the government from commenting on a defendant's decision not to testify at his trial.¹⁸⁷ Second, at least one circuit read the Supreme Court's opinions in *Doyle v. Ohio* and *Jenkins v. Anderson* to limit their application only to the government's use of a defendant's silence to impeach his credibility.¹⁸⁸ Third, these circuits drew distinctions between pre-custody and post-custody silence and pre-arrest and post-arrest silence when they determined whether or when the Fifth Amendment bars the government's use of silence in its case-in-chief.¹⁸⁹ Other circuits, however, have looked at the same issue under the same or similar facts and have reached dramatically different conclusions.

B. Federal Circuit Courts of Appeal Concluding That the Government May Use a Defendant's Silence in Its Case-in-Chief

In 1991, the United States Court of Appeals for the Eleventh Circuit opined, in a case remarkably similar to *United States v. Caro*, that the government may comment on a defendant's pre-*Miranda* silence in its case-in-chief without

summation before the magistrate, the government argued that the defendant's silence proved that he knowingly possessed counterfeit notes. *Id.* at 1008. The district court determined first that the defendant was not in custody during the transaction and therefore was not entitled to a *Miranda* warning. *Id.* at 1009. Next, the court discussed the United States Supreme Court case of *Jenkins v. Anderson*, 447 U.S. 231 (1980), focusing on Justice Stevens's concurring opinion which noted that "the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official obligation to speak." *See id.* at 1010 (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring)). The court then concluded that absent any official compulsion to speak, the use of a defendant's pre-arrest and pre-*Miranda* silence in the government's case-in-chief turns on the rules of evidence and not the Constitution. *See id.* at 1011 (noting that the court cashier was not a law enforcement officer and thus defendant was not compelled to respond). And despite its *Caro* opinion a few months earlier, the Second Circuit affirmed the district court's opinion in an unreported summary order. *See United States v. Robinson*, 685 F.2d 427 (1982) (granting summary order). In a footnote to its order, however, the Second Circuit notes that "a summary order is not citable as precedent." *Id.*

187. *See supra* note 154 and accompanying text (discussing the use of *Griffin v. California* to bar the admission of a defendant's pre-trial silence).

188. *See supra* notes 106-12, 117, 121-26 and accompanying text (discussing the idea that *Doyle v. Ohio* and *Jenkins v. Anderson* limited their holdings to the use of silence to impeach a defendant's credibility).

189. *See supra* notes 145-84 and accompanying text (discussing courts that distinguish between pre- and post-custodial silence and pre- and post-arrest silence when deciding whether the government can use silence to prove guilt).

offending the Constitution.¹⁹⁰ In *United States v. Rivera*, the Eleventh Circuit considered whether the prosecution violated the petitioner's constitutional rights when it commented in its case-in-chief on her silence at three different points during the initial investigation and her subsequent arrest.¹⁹¹ First, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony that she was "without any visible signs of agitation or nervousness about being singled out for questioning" by a customs inspector at an airport luggage carousel.¹⁹² Second, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony that the petitioner failed to protest or react after a customs inspector discovered cocaine in her suitcase but before her arrest.¹⁹³ And third, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony in its case-in-chief that the petitioner was not "physically upset" after the customs inspector placed her under arrest and read her the *Miranda* warning.¹⁹⁴

Citing *Jenkins v. Anderson*, the *Rivera* court concluded that the government may comment on a defendant's silence in its case-in-chief when it occurs before her arrest and before she is read the *Miranda* warnings.¹⁹⁵ Then, citing *Fletcher v. Weir*, the court determined that the government may comment on a defendant's post-arrest but pre-*Miranda* silence, even if a defendant is in custody.¹⁹⁶ To support these conclusions, the court reasoned that because the petitioner had not yet received the *Miranda* warning, then "she had not yet received such affirmative assurances . . . [that] the government could unquestionably comment on her silence[]." ¹⁹⁷ The *Miranda* warning, and not the petitioner's arrest or

190. *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991); *see also* *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (holding that the government cannot constitutionally use a defendant's silence in its case-in-chief).

191. *Rivera*, 944 F.2d at 1567, 1569 n.20.

192. *Id.* at 1567. The petitioner and two others arrived at Miami International Airport from Barranquilla, Colombia. *Id.* at 1565. A customs inspector approached the group at a luggage carousel and asked them questions related to the purpose and itinerary of their trip. *Id.*

193. *Id.* at 1567. After approaching the petitioner and her companions at the luggage carousel, the customs inspector decided to examine their luggage and escorted them to an inspection area. *Id.* at 1565. Finding a false bottom in petitioner's suitcase, the inspector discovered cocaine. *Id.*

194. *Id.* at 1567. After the customs inspector discovered cocaine in the petitioner's luggage, she was taken to a separate room, read the *Miranda* warning, and placed under arrest. *Id.* The court also noted that the government, in its closing statement to the jury, asked the jury to infer that the petitioner was guilty because of her consistent indifference to the custom inspector. *Id.* at 1567.

195. *Id.* at 1568 n.10. The court assumed that even though the petitioner objected to the inspector's testimony about the petitioner's silent demeanor, and not specifically about her silence, the inspector's testimony could be construed as comments on the petitioner's silence. *Id.* at 1567-68.

196. *Id.* at 1568 n.11.

197. *Id.* at 1568 n.12. The *Rivera* court pointed to that part of *Fletcher v. Weir* where the court explicitly rejected the idea that an arrest, by itself, induces a defendant to remain silent. *See id.*

custody, is the triggering mechanism that assures a defendant that his silence will not be used against him.¹⁹⁸ *Rivera* stated that the government was “clearly entitled” to comment on the petitioner’s pre-*Miranda* silence and that the government could argue that the petitioner’s silence or silent demeanor was inconsistent with her claim of innocence.¹⁹⁹ Notably, the *Rivera* court decided the case under the Fourteenth Amendment’s due process restrictions first articulated in *Doyle v. Ohio* and despite the availability of *Griffin v. California*, it did not assert, or even imply, that the Fifth Amendment’s privilege against self-incrimination bore at all on the issue.

The Fifth Amendment does, however, prohibit the prosecution from commenting on a defendant’s post-*Miranda* silence.²⁰⁰ In *United States v. Tenorio*, the Eleventh Circuit considered whether the government may comment on a defendant’s post-*Miranda* silence to establish proof of his guilt.²⁰¹ Citing

(citing *Fletcher v. Wier*, 455 U.S. 603, 606-07 (1982)).

198. *Id.* at 1568. The *Rivera* court suggested that the government’s use of the petitioner’s silence after she was read the *Miranda* warnings may have been in error, but that the error was harmless. *Id.* at 1569.

199. *Id.* The Eleventh Circuit first intimated that the prosecution could use a defendant’s pre-trial silence in its case-in-chief in *United States v. Nabors*, 707 F.2d 1294, 1299 (11th Cir. 1983). In *Nabors*, the prosecution presented evidence in its case-in-chief that the defendant failed to respond to an insurer’s request for information about damage to an aircraft that was destroyed to cover up a drug smuggling operation. *Id.* at 1295-96, 1297. The appellant objected to this evidence, arguing that its admission violated his right to remain silent under the Fifth Amendment. *Id.* at 1298. Admitting that the issue before it was “difficult to decide” the court noted nonetheless that the case was unlike *Doyle v. Ohio* and *Jenkins v. Anderson* because the government here attempted to use silence to infer guilt, and not to impeach the defendant, and because the silence here was not in response to police interrogation, but to a private insurance company. *Id.* Undeterred by a lack of authority espousing the government’s use of silence in its case-in-chief, the court determined that since the appellant never asserted his right to remain silent when he refused to respond to the insurer’s request for information, he could not claim it at trial. *Id.* at 1299. The court noted that had the appellant said something to his insurer, the government could use that statement against him and it saw no reason why the same should not be true for the use of his silence. *Id.*

The Eleventh Circuit reaffirmed its ruling in *Rivera* in *United States v. Simon*, 964 F.2d 1082 (11th Cir. 1992). In *Simon*, the appellant objected to the government’s use of his pre-arrest silence in its case-in-chief. *Id.* at 1086 n.*. The court rejected appellant’s contention, citing to *Rivera* for the proposition that “silence is admissible in the absence of *Miranda* warnings.” *See id.* (citing *Rivera*, 944 F.2d at 1568). More recently, the Eleventh Circuit had an opportunity to reconsider its *Rivera* decision when it decided *United States v. Campbell*, 223 F.3d 1286 (11th Cir. 2000) (per curiam). In *Campbell*, the appellant contended that the government impermissibly commented on his pre-*Miranda* silence in its case-in-chief and that *Rivera* was decided wrongly. *Id.* at 1290. The court, however, chose not to address the merit of appellant’s objection, instead finding that even if the court erred, the error was not plain (and thus not reversible). *Id.*

200. *See United States v. Tenorio*, 69 F.3d 1103 (11th Cir. 1995).

201. *Id.* at 1105-06. In *Tenorio*, a customs inspector at Miami International Airport searched

Griffin v. California and *Doyle v. Ohio*, the court ruled that the trial court violated the Fifth and Fourteenth Amendments when it allowed the government to comment on the defendant's post-*Miranda* silence.²⁰² First, the court determined that the government failed to draw time distinctions that would have allowed the jury to understand whether the prosecutor commented on the defendant's pre- or post-*Miranda* silence.²⁰³ Second, the court concluded that the jury could have convicted the defendant solely on the defendant's post-*Miranda* silence.²⁰⁴ As such, the trial court violated the defendant's Fourteenth Amendment right to due process when it allowed the government to impeach him with his post-*Miranda* silence, and it violated the defendant's Fifth Amendment privilege against self-incrimination when it allowed the government to use his post-*Miranda* silence to prove his guilt.²⁰⁵ Notably, in a concurring opinion, Judge Edmondson endorsed the *Rivera* opinion when he wrote, "[t]he law of this circuit is settled that evidence of pre-*Miranda* silence is admissible in the government's case-in-chief as substantive proof of guilt."²⁰⁶ So while the government may not constitutionally comment on a defendant's silence after he has been assured that his silence will carry no penalty, the government may comment on his pre-*Miranda* silence, even in its case-in-chief, because the defendant was never promised that his silence would not be used against him.

Both the Fourth and Fifth Circuits agree with the Eleventh Circuit that the prosecution may use a defendant's pre-*Miranda* silence if that silence is inconsistent with the defendant's innocence.²⁰⁷ For example, in *United States v.*

the defendant's suitcase, discovered heroin, and apprised the defendant of his rights. *Id.* at 1104-05. At trial, the inspector testified that the defendant was not surprised when heroin was found in his bag. *Id.* at 1105. The defendant, after having waived his privilege against self-incrimination, testified that the suitcase was loaned to him, and that he did not tell the customs inspector this exculpatory story because he decided to exercise his right to remain silent. *Id.* The prosecution argued in its summation that the defendant's silence immediately after the inspector discovered heroin in his suitcase evidenced his guilt. *Id.* at 1105. The trial court overruled the defendant's objection to the use of his silence, finding that the government was allowed to comment on the defendant's pre-*Miranda* silence. *Id.* at 1106.

202. *See id.* (citing *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976)).

203. *Id.*

204. *Id.*

205. *Id.* The court concluded that the government violated the defendant's right to due process because the *Miranda* warnings carry an implicit assurance "that silence will carry no penalty" and because silence has "low probative value." *See id.* (citing *Doyle*, 426 U.S. at 617-19). The court also concluded that the trial court violated the defendant's Fifth Amendment right presumably because the defendant's "silence was the touchstone of the government's case-in-chief." *Id.* at 1107.

206. *See id.* at 1108 (Edmondson, J., concurring).

207. *See United States v. Cain*, No. 97-4059, 1998 WL 141205 (4th Cir. Mar. 27, 1998) (per curiam) (holding government may comment on defendant's pre-*Miranda* silence in its case-in-chief); *United States v. Musquiz*, 45 F.3d 927, 931 (5th Cir. 1995) (holding government may use

Cain, an unpublished opinion from the Fourth Circuit, the court considered *per curiam* whether a trial court erred when it allowed a witness for the prosecution to testify that the defendant “really didn’t want to answer any . . . questions” during a police search of his trailer.²⁰⁸ While the court was unable to determine whether or when the defendant was *Mirandized*, it did rule that the government could have commented on a defendant’s silence so long as it occurred before *Miranda* warnings were given.²⁰⁹ Prior to *Cain*, the Fourth Circuit twice concluded that the government may comment on a defendant’s pre-*Miranda* silence without offending the Constitution.²¹⁰ First, in *Folston v. Allsbrook*, the Fourth Circuit ruled that the government may use a defendant’s silence in its case-in-chief when that silence was not a result of police interrogation but instead was observed by an accomplice while both were held in the same jail cell.²¹¹ Noting that the government had not yet induced the defendant’s silence with a *Miranda* warning, the court concluded that “his silence was [not] so ambiguous and so without probative value as to be inadmissible.”²¹² Later, in *United States v. Love*, the Fourth Circuit considered more directly whether the government may comment on a defendant’s pre-*Miranda* silence at his arrest in its case-in-chief.²¹³ In *Love*, a witness for the prosecution, a police officer, testified that the defendants failed to explain their presence at the scene of a crime.²¹⁴ The defendants objected, presumably contending that the Constitution prohibits the government from using their silence to infer guilt. The court disagreed, explaining that the defendants had not received any *Miranda* warnings at the time the witness had observed their silence.²¹⁵ Relying on *Fletcher v. Weir*, the court concluded that the Constitution does not bar the government from using a

pre-*Miranda* silence in its case-in-chief if its probative value is high).

208. *Cain*, 1998 WL 141205 at *6.

209. *See id.* (citing *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991)).

210. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *Folston v. Allsbrook*, 691 F.2d 184, 187 (4th Cir. 1982).

211. *Folston*, 691 F.2d at 187. In *Folston*, an accomplice testified against the appellant to conversations he had with the appellant and a third accomplice while all three were held in a jail cell. *Id.* at 185. Over the appellant’s objections, the accomplice testified that the appellant remained silent when he asked the appellant why he shot the victim. *Id.* at 187.

212. *Id.* The *Folston* court relied on *Fletcher v. Weir* for the idea that “*Doyle* is inapplicable when the record does not indicate that the defendant ‘received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.’” *Id.* (quoting *Fletcher v. Weir*, 455 U.S. 603, 605 (1982)). Despite the fact that *Doyle* and *Fletcher* talked about the use of silence to impeach a defendant, the court made no analytical distinction between the use of silence to impeach a defendant’s credibility and the use of silence to prove the defendant’s guilt—both uses could survive a constitutional attack if the silence either preceded a *Miranda* warning or occurred outside a police interrogation and without a *Miranda* warning. *Id.*

213. *Love*, 767 F.2d at 1063.

214. *Id.*

215. *Id.* The opinion does not indicate whether or when the defendants received a *Miranda* warning.

defendant's pre-*Miranda* silence against him.²¹⁶ Both *Folston v. Allsbrook* and *United States v. Love* read *Doyle* and *Fletcher* to allow the government to comment on a defendant's pre-*Miranda* silence, despite the fact that the government was using the defendant's silence to prove his guilt and not just to impeach his credibility. Only when a defendant relies on the implicit promises of a *Miranda* warning will the Fourth Circuit prohibit the government from using his silence against him.²¹⁷

While the Fifth Circuit initially prohibited the use of silence to evidence guilt, it has grown increasingly sympathetic to the idea that the use of silence, when that silence is not induced by any governmental action, is not constitutionally defective.²¹⁸ In 1976, one month before the United States Supreme Court explained in *Doyle v. Ohio* that due process prohibits the government from using a defendant's post-*Miranda* silence to impeach him, the Fifth Circuit determined that the government may not comment on a defendant's silence—either pre- or post-*Miranda*—because such a use, when analyzed under evidentiary rules, is intolerably prejudicial.²¹⁹ Relying largely on the Supreme Court's decision in *United States v. Hale*, the Fifth Circuit, in *United States v. Impson*, did not decide on constitutional grounds whether the trial court erred when it allowed the government to comment on the defendant's pre-*Miranda* silence in its case-in-chief, but rather relied on the rules of evidence.²²⁰ Since the court analyzed the case under evidentiary rules, and not the Constitution, it made little difference to the court whether the government used silence to impeach or to evidence guilt, or whether the silence was observed before or after a *Miranda* warning—the admissibility of silence turned on whether its probative value exceeded its prejudicial impact.²²¹ *Impson* reflects the Fifth Circuit's hostility toward the use of silence in any guise, implicitly broadening the reach of *Miranda* by refusing to distinguish between silence either before or after the

216. *Id.* (citing *Fletcher*, 658 F.2d at 1129).

217. *See supra* notes 207-08 and accompanying text (discussing *United States v. Cain*, No. 97-4059, 1998 WL 141205 (4th Cir. Mar. 27, 1998)).

218. *Compare* *United States v. Impson*, 531 F.2d 274, 279 (5th Cir. 1976) (holding use of pre- or post-*Miranda* silence is intolerably prejudicial), *with* *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding Fifth Amendment does not bar the use of silence that was not induced by the government).

219. *Impson*, 531 F.2d at 279. In *Impson*, a police officer testified that the defendant remained silent following his arrest. *Id.* at 275. The defendant objected, arguing that he was not apprised of his right to remain silent and that the officer's testimony infringed on his right to remain silent. *Id.* at 276.

220. *Id.* at 275-76.

221. *Id.* at 276-78; *see also* *United States v. Henderson*, 565 F.2d 900, 905 (5th Cir. 1978) (holding that admissibility of silence turns on its probative value). The *Impson* court chose not to distinguish between pre- and post-*Miranda* silence in part because such a distinction might reward police for failing to inform a suspect immediately upon his arrest of his right to remain silent. *Impson*, 531 F.2d at 277. This argument assumes, of course, that police officers will willingly manipulate constitutional requisites to their advantage.

Miranda warning.

In the wake of *Fletcher v. California*, the Fifth Circuit conceded in *United States v. Musquiz* that the government can comment on a defendant's post-arrest yet pre-*Miranda* silence.²²² After explaining that the Supreme Court had since narrowed the breadth of its *Miranda* decision, the court explained that the Constitution does not bar the government's use of a defendant's pre-*Miranda* silence to impeach his credibility.²²³ Furthermore, the court expressly recognized that silence not induced by a *Miranda* warning can have probative value and, citing to the Eleventh Circuit's *Rivera* opinion, it appeared sympathetic to the use of pre-*Miranda* silence in the government's case-in-chief.²²⁴ Notably, the court acknowledged the circuit's recent hostility to the use of silence, writing that this "hostility seems to have flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment" that can no longer be justified under the Constitution.²²⁵

Finally, in *United States v. Zanabria*, the Fifth Circuit expressly ruled that the Fifth Amendment does not protect a defendant's silence if that silence was not induced by government action.²²⁶ In *Zanabria*, the defendant argued that the government's use of his pre-arrest silence in its case-in-chief violated his right to remain silent under the Fifth Amendment.²²⁷ The court noted that "the silence at issue was neither induced by nor a response to any action by a government agent" and explained that the Fifth Amendment only protects against compelled self-incrimination and not every incriminating silence.²²⁸ While *Zanabria* did not explicitly rule that the *Miranda* warning itself serves as the triggering mechanism to determine whether police induced a defendant's silence, it recognized that the Fifth Amendment only protects an incriminating silence observed after the government either compelled it or assured the defendant that his silence would not be used against him.

The Ninth Circuit, however, has determined that custody, and not the *Miranda* warnings, triggers the protections afforded by the Fifth Amendment—a

222. *United States v. Musquiz*, 45 F.3d 927, 930-31 (5th Cir. 1995). In *United States v. Musquiz*, the defendant offered an exculpatory story for the first time at his trial. *Id.* at 930. The prosecution, in its cross-examination of the defendant, inquired why the defendant had not offered this explanation at the time of his arrest, but before he was read the *Miranda* warning. *Id.*

223. *Id.*

224. *Id.* at 930-31.

225. *Id.* at 930.

226. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).

227. *Id.* In *United States v. Zanabria*, the defendant was tried for the unlawful possession, distribution, and importation of controlled substances. *Id.* at 591. While the defendant chose not to testify in his own defense, he argued that his actions were the product of duress. *Id.* at 592. In an attempt to rebut the defendant's defense, the arresting customs officer testified that the defendant failed to make mention of any evidence pointing to duress before his arrest. *Id.* at 593. The government used this testimony in its closing remarks to rebut the defendant's duress defense. *Id.*

228. *Id.*

suspect's silence is fair game if it occurs before his arrest but not after.²²⁹ In 1998, the Ninth Circuit concluded, in *United States v. Oplinger*, that the government may comment on a defendant's pre-arrest silence without offending either due process or the Fifth Amendment.²³⁰ In *Oplinger*, the appellant appealed his conviction for bank fraud on the ground that the prosecution, in its direct case against him, violated his privilege against self-incrimination when it elicited testimony from his employer that he remained silent when questioned about a number of suspicious transactions.²³¹ The court disagreed.²³² According to the unambiguous language of the Fifth Amendment, the court opined, the privilege against self-incrimination only comes into play when government compels silence.²³³ Here, the appellant's silence was observed by his employer, not the police—as such, the appellant failed to raise a valid constitutional claim.²³⁴ The *Oplinger* court explained that the “self-incrimination clause was intended as a ‘limitation on the investigative techniques of government, not as an individual right against the world.’”²³⁵ The difficulty for the circuit, however, rested in determining when governmental techniques were compelling enough to trigger a suspect's Fifth Amendment right to remain silent.

The Ninth Circuit resolved partially that question in 2000 when it decided *United States v. Whitehead*.²³⁶ In *Whitehead*, the prosecution commented on the appellant's post-arrest but pre-*Miranda* silence in its case-in-chief.²³⁷ The court held that the comment violated the appellant's right to remain silent under the Fifth Amendment, presumably because the appellant was in custody when police observed his silence.²³⁸ Notably, the *Whitehead* court suggests that because the

229. See *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001) (holding government may not use defendant's post-arrest and pre-*Miranda* silence in its case-in-chief); *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding government may use defendant's pre-arrest and pre-*Miranda* silence without offending the Constitution).

230. *Oplinger*, 150 F.3d at 1067.

231. *Id.* at 1065-66.

232. *Id.* at 1066.

233. *Id.* at 1066-67. The court was highly persuaded by Justice Stevens's concurrence in *Jenkins v. Anderson*. *Id.* at 1066. The court cited with approval Justice Stevens's opinion that the privilege against self-incrimination is simply irrelevant to a person's decision to remain silent before he has any contact with the police. See *id.* (citing *United States v. Jenkins*, 447 U.S. 231, 243-44 (1980) (Stevens, J. concurring)).

234. *Id.* at 1067.

235. *Id.* (quoting *United States v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997)). While the court notes that the First, Seventh, and Tenth Circuits disagree with its holding, it wrote that “the position those courts have endorsed is simply contrary to the unambiguous text of the Fifth Amendment, which plainly states that ‘[n]o person . . . shall be *compelled* in any criminal case to be a witness against himself.’” See *id.* at 1067 (citing U.S. CONST. amend. V (alteration in original)).

236. *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000).

237. *Id.* at 637.

238. *Id.* at 639. The court explicitly stated that its holding does not conflict with *United States*

right to remain silent derives from the Constitution and not from the *Miranda* warnings, comment on a suspect's silence after his arrest violates the Fifth Amendment regardless of whether a suspect is *Mirandized*.²³⁹ This approach extended the reach of *Doyle v. Ohio* to prohibit the government's use of silence even without a *Miranda* warning.²⁴⁰ Under *Whitehead*, a suspect's Fifth Amendment right to remain silent attaches at his arrest or custody, before the government implicitly assures him that his silence will not be used against him and even before the police begin to interrogate him. And while pre-arrest silence is still fair game, an arrest or custody in the Ninth Circuit must be the type of "investigative technique" that triggers the Fifth Amendment, even though the court failed to explain how an arrest on its own compels suspects to remain silent.

In more recent cases, the Ninth Circuit has reaffirmed its rule that the right to remain silent attaches at the arrest, not when a suspect is read the *Miranda* warnings. Although the government may comment on a suspect's pre-arrest silence in its case-in-chief, it may not comment on a suspect's post-arrest silence, regardless of when or whether the suspect was *Mirandized*.²⁴¹ For example, in *United States v. Velarde-Gomez*, the court considered whether evidence of a

v. Oplinger because in that case the appellant was not in custody. *Id.*

The *Whitehead* court relied on two Ninth Circuit decisions to support its holding. *Id.* at 638-39. First, it cited *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978), which held that the prosecution may not comment on a defendant's post-arrest silence in its case-in-chief regardless of whether the *Miranda* warnings were given. *Whitehead*, 200 F.3d at 638-39; *Douglas*, 578 F.2d at 267. Of note, Judge Carter, in his dissenting opinion to *Douglas*, stated that the Supreme Court has not established a "per se rule that under no circumstances can evidence of silence after an arrest be admitted without violating the Constitution." *Id.* at 268 (Carter, J. dissenting). In fact, the Supreme Court would soon rule that pre-*Miranda* silence could be used to impeach a defendant. *See supra* notes 131-38 and accompanying text (discussing *Fletcher v. Weir* and the use of pre-*Miranda* silence). Second, the court cited *United States v. Baker*, 999 F.2d 412 (9th Cir. 1993). *Whitehead*, 200 F.3d at 639. In *Baker*, the Ninth Circuit held that the government's use of a defendant's silence in its closing summary violated the defendant's due process rights, because the jury had no way of distinguishing whether the prosecutor was using the defendant's silence before or after the *Miranda* warnings. *Baker*, 999 F.2d at 415. And while the *Baker* court implicitly suggested that the government can safely comment on pre-*Miranda* silence, the *Whitehead* court discounted this suggestion, explaining first that the statement was rank dicta, and second that it otherwise did not comport with the court's *Douglas* precedent. *Whitehead*, 200 F.3d at 639; *Baker*, 999 F.2d at 415.

239. *Whitehead*, 200 F.3d at 638; *see also* *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001) (noting *Whitehead* recognized that silence is protected regardless of a *Miranda* warnings because the right is derived from the Constitution and not from the warning itself).

240. *See* *United States v. Bushyhead*, 270 F.3d 905, 912 (9th Cir. 2001) (noting that *Whitehead* broadened the reach of *Doyle*).

241. *See* *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (holding government may use defendant's pre-arrest silence in its case-in-chief); *see also* *United States v. Velarde-Gomez*, 269 F.3d 1023, 1033 (9th Cir. 2001) (holding government cannot use defendant's post-arrest yet pre-*Miranda* silence in its case-in-chief).

defendant's silent demeanor after his arrest but before he was *Mirandized* violated his Fifth Amendment privilege against self-incrimination.²⁴² First, the court concluded that evidence of a suspect's silent demeanor is equivalent to evidence of silence.²⁴³ The court then concluded that the government violated the appellant's right to remain silent under the Fifth Amendment when it commented on his pre-*Miranda* silence in its case-in-chief, explaining that *Doyle v. Ohio* announced that the Fifth Amendment (and not the *Miranda* warnings) implicitly assures a person that his silence will carry no penalty.²⁴⁴ Since the Fifth Amendment's right to remain silent attached when the appellant was in custody, the "individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given."²⁴⁵

Unfortunately, the *Velarde-Gomez* court both misconstrued *Doyle* and the facts of its case when it concluded that the government violated the appellant's Fifth Amendment rights when it commented on the defendant's pre-*Miranda* but post-arrest silence. First, *Doyle* held that the *Miranda* warning itself implicitly promises a suspect that his silence will carry no penalty and that the use of post-*Miranda* silence violates the Fourteenth Amendment, not the Fifth Amendment.²⁴⁶ Second, the defendant's silent demeanor was observed when the customs inspector informed the appellant why he was being detained—it was not observed in response to a custodial interrogation.²⁴⁷ Nonetheless, *Velarde-Gomez* reaffirmed that use of post-arrest but pre-*Miranda* silence violates the Fifth Amendment.

One week after the court filed its *Velarde-Gomez* opinion, the Ninth Circuit decided *United States v. Bushyhead* and this time ruled that the government may not constitutionally comment on a suspect's silence when that silence evidences

242. *Velarde-Gomez*, 269 F.3d at 1025-26. In this case, the appellant-defendant moved the trial court to exclude evidence of his silence and silent demeanor both before and after he was *Mirandized* by customs inspectors. *Id.* at 1026. The trial court granted the motion, but later reconsidered its ruling and permitted the government to introduce evidence of the appellant's demeanor both before and after he was read the *Miranda* warnings. *Id.* at 1026-27. At trial, the government then elicited testimony from the customs inspector that the appellant was non-responsive before he was read the *Miranda* warnings. *Id.* at 1027. And again in its closing summary to the jury, the government commented on the appellant's calm, relaxed, and emotionless demeanor when customs inspectors discovered marijuana in his car. *Id.* at 1028.

243. *Id.*

244. *Id.*

245. *Id.* at 1029. To support this analysis, the court cited *United States v. Whitehead*, which recognized "that because the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given ... comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *Id.* (citing *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000)). Again, the court failed to explain how an arrest without interrogation compels a suspect to incriminate himself.

246. See *supra* notes 106-17 and accompanying text (discussing *Doyle v. Ohio*).

247. *Velarde-Gomez*, 269 F.3d at 1027-28.

the suspect's invocation of his right to remain silent.²⁴⁸ In *Bushyhead*, the trial court admitted testimony during the government's case-in-chief that the appellant, after his arrest but before he was read the *Miranda* warning, stated to police "I have nothing to say, I'm going to get the death penalty anyway."²⁴⁹ Summarily ruling that the statement was not an unsolicited confession but rather an invocation of silence itself, the court first concluded that the testimony violated the appellant's Fifth Amendment right to remain silent.²⁵⁰ Like *Velarde-Gomez*, the court explained that its decision in *United States v. Whitehead* extended *Doyle v. Ohio* to protect pre-*Miranda* silence and statements that invoke silence.²⁵¹ The Ninth Circuit, then, prohibits comment on a defendant's post-arrest but pre-*Miranda* silence and statements that invoke his right to remain silent and supports this view with a liberal reading of *Doyle v. Ohio*. The government may, however, still comment in its case-in-chief on a defendant's silence so long as the silence was observed before his arrest.²⁵²

Generally, the circuits that permit the government to use a defendant's silence in its case-in-chief advance two reasons to support their conclusions. First, these circuits suggest that without the affirmative assurances embodied in the *Miranda* warnings that a suspect's silence will carry no penalty, the government may comment on a suspect's pre-*Miranda* silence without violating the Fourteenth Amendment's Due Process Clause.²⁵³ For support, these circuits rely on the doctrinal underpinnings of *Doyle v. Ohio* to allow the government to use a defendant's silence not only to impeach his credibility but to infer guilt. Second, these circuits opine that without some element of official coercion—required by the plain language of the Fifth Amendment—that induces a suspect to remain silent, the Fifth Amendment is simply irrelevant.²⁵⁴ Under the Ninth Circuit's analysis, only when the court treats an arrest itself as sufficiently coercive will the Fifth Amendment bar the use of a suspect's post-arrest silence.²⁵⁵ So while the circuits that prohibit the use of a suspect's silence

248. *United States v. Bushyhead*, 270 F.3d 905, 913 (9th Cir. 2001).

249. *Id.* at 911.

250. *Id.* at 912-13. Without analysis, the court determined that the appellant invoked his right to remain silent when he told police, "I have nothing to say, I'm going to get the death penalty anyway." *Id.* at 912. Presumably, the trial court allowed the statement as a voluntary confession to the crime. The court, however, fails to explain how the trial court abused its discretion.

251. *Id.*

252. *See United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (holding that the use of pre-arrest and pre-*Miranda* silence to prove guilt is permissible); *Johnson v. LaMarque*, No. C-02-00394 CRB (PR), 2003 WL 1798117, at *4 (N.D. Cal. Apr. 2, 2003) (holding government may use pre-arrest silence in its case-in-chief).

253. *See generally supra* Part IV.B (discussing use of pre-*Miranda* silence under Fourteenth Amendment).

254. *See generally supra* Part IV.B (discussing use of pre-*Miranda* silence under Fifth Amendment).

255. *See supra* note 238 and accompanying text (discussing the Ninth Circuit's opinion that arrest is coercive enough to implicate a suspect's Fifth Amendment rights).

in the government's case-in-chief advance a broad view of the Fifth Amendment's reach and a textual (and narrow) view of the Court's post-*Miranda* decisions, those circuits that allow silence advance a textual (and narrow) construction of the Fifth Amendment together with a broad view of the post-*Miranda* decisions.

V. A CASE FOR THE USE OF SILENCE IN THE GOVERNMENT'S CASE-IN-CHIEF

To resolve whether a trial court may constitutionally permit the government to comment on a defendant's silence to demonstrate proof of his guilt requires a two-step inquiry: first, whether the *Miranda* warnings (and not the arrest) serve as the triggering mechanism for the Fifth Amendment's privilege against compelled self-incrimination, thus protecting only post-*Miranda* silences; and second, whether the Fourteenth Amendment's Due Process Clause prohibits the use of pre-*Miranda* silence when that silence was neither induced nor compelled by the government. Despite the inconsistent results in the federal circuits, the United States Supreme Court's jurisprudence has resolved partially each of these issues, although without explicitly determining the constitutionality of the use of silence in the government's case-in-chief. When read together, these cases beg the conclusion that the Constitution simply does not bar the use of a defendant's pre-*Miranda* silence in the government's case-in-chief.

A. *The Fifth Amendment Does Not Bar the Use of a Defendant's Silence in the Government's Case-in-Chief*

The Supreme Court teaches that the *Miranda* warnings themselves serve as the triggering mechanism for the Fifth Amendment's privilege against compelled self-incrimination. The Fifth Amendment is simply not implicated before the government is required to recite the warnings because the Fifth Amendment does not reach beyond the custodial interrogation that first prompted the *Miranda* Court to expand the Fifth Amendment's protection. The Court, in *Miranda v. Arizona*, perfected a defendant's rights under the Fifth Amendment by requiring the government to first warn a suspect of his right to remain silent and his right to counsel before it begins a custodial interrogation.²⁵⁶ The coercive atmosphere of the station-house interview prompted the Court to move beyond the traditional due process test which required proof that, in the totality of the circumstances, a confession had to be voluntary to be admissible against the defendant.²⁵⁷ In linking its ruling to the dangers inherent to a custodial interrogation, the Court recognized the "intimate connection between the privilege against self-incrimination and police custodial questioning."²⁵⁸ The opinion, designed to protect the core rights found under the Fifth Amendment, announced a Constitution-based exclusionary rule that added to, but never supplanted,

256. See *supra* Part II (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

257. See *supra* Part II (discussing *Miranda*).

258. See *Miranda*, 384 U.S. at 458 (narrowing its ruling to custodial interrogation); see also *supra* notes 65-77 and accompanying text (discussing *Miranda*).

traditional Fifth Amendment jurisprudence.²⁵⁹

Since *Miranda*, the Court has affirmed that the Constitution does not demand the exclusion of a defendant's incriminating yet unwarned statements or silences. In *Rhode Island v. Innis*, the Court expanded the definition of "custodial interrogation" (and thus the reach of the Fifth Amendment's exclusionary rule) to include express questioning or its "functional equivalent."²⁶⁰ The *Innis* Court defined "functional equivalent" as "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."²⁶¹ Thus, while the Court expanded the reach of *Miranda*, it affirmed that only responses to an interrogation or its equivalent are inadmissible under the Fifth Amendment's exclusionary rule since only then could a statement (or silence) be compelled. Furthermore, the Court in both *California v. Beheler* and *Berkemer v. McCarty* suggested that while custody (or an arrest) determines when a suspect is owed a *Miranda* warning, the warning itself determines the admissibility of incriminating responses in the course of an official interview.²⁶² Justice Marshall, writing for the majority in *Berkemer*, succinctly noted that "we have frequently reaffirmed the central principle established by [*Miranda*]: if the police take a suspect into custody and then ask him questions without informing him of [his rights], his responses cannot be introduced into evidence to establish his guilt."²⁶³ The arrest or custody of a suspect only requires the police to warn him of his rights. Only when the government attempts to admit his incriminating statements or silences made in the course of a custodial interrogation (or its equivalent) will the Fifth Amendment's exclusionary rule prevent their admission. The Fifth Amendment is not triggered until a suspect is compelled to incriminate himself and a suspect is only compelled to incriminate himself when he is asked to respond to an official question after his arrest or custody. The failure to *Mirandize* a suspect in the course of a custodial interrogation creates a presumption of compulsion and demands the exclusion of incriminating responses even if those incriminating responses were voluntary.²⁶⁴

This idea was reaffirmed in *Oregon v. Elstad*.²⁶⁵ In *Elstad*, the Court considered whether an unwarned yet voluntary statement made in the course of a custodial interrogation rendered a later warned and voluntary confession inadmissible.²⁶⁶ While the Court was concerned with the admissibility of a

259. See *supra* note 96 (discussing *Dickerson v. United States*, 530 U.S. 428, 432 (2000), which held that *Miranda* announced a constitutional ruling and not merely a constitutional safeguard).

260. See *supra* note 87 (discussing *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

261. *Innis*, 446 U.S. at 301; see *supra* notes 87-88 (discussing *Innis*, 446 U.S. at 291).

262. See *supra* notes 89-95 and accompanying text (discussing *Berkemer* and *Beheler*).

263. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

264. See *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (discussing *Miranda*).

265. *Id.* at 318 (holding that an unwarned response to police questioning does not prevent defendant from later waiving his rights and confessing).

266. *Id.* at 300. In *Elstad*, the defendant made voluntary yet incriminating statements to police

subsequent and fully-warned statement, its opinion reaffirmed the core principle of *Miranda* that “[t]he Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony.”²⁶⁷ Thus, the defendant’s answers to police questioning while he was in custody and subjected to custodial interrogation were inadmissible under *Miranda* despite the fact that his responses were wholly voluntary and uncoerced.²⁶⁸ The Court concluded that “[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State’s case in chief.”²⁶⁹ Because *Miranda*’s presumption of compulsion is intrinsically tied to interrogation, logic dictates that without interrogation there can be no compulsion—and without compulsion, the constitutional prohibition against compelled self-incrimination does not apply. Silence, then, observed after an arrest but before the *Miranda* warning is not compelled unless it is in response to a question, and therefore its use is determined, not under the Fifth Amendment’s privilege against self incrimination, but under the routine rules of evidence that ask whether the probative significance of that silence is greater than its prejudice to the defendant.

Justice Stevens, in his concurrence in *Jenkins v. Anderson*, agrees with this analysis.²⁷⁰ In *Jenkins*, the Court held that the government can use a defendant’s pre-arrest silence to impeach his credibility at trial without violating due process since no governmental action induced the defendant to remain silent.²⁷¹ Justice Stevens, while concurring with the majority’s result, wrote, “the privilege against compulsory self-incrimination is simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.”²⁷² The Justice continued, “[t]he fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police.”²⁷³ Justice Stevens warned, “[a] different view ignores the clear words of the Fifth Amendment.”²⁷⁴ So, while the Fifth Amendment may protect a defendant who submits to interrogation, it

at his home without the benefit of a *Miranda* warning. *Id.* at 301. Later, at the police station, the defendant was first *Mirandized*, waived his rights, and offered a full statement to the police. *Id.* The defendant argued that his first unwarned, and thus inadmissible, statements tainted his later warned statement as to render it too inadmissible. *Id.* at 302.

267. *Id.* at 306-07.

268. *Id.* at 307-08.

269. *Id.* at 317 (emphasis added).

270. See *supra* note 127 (discussing Justice Stevens’s concurrence).

271. See *supra* notes 122-26 and accompanying text (discussing *Jenkins*).

272. *Jenkins*, 447 U.S. at 241, 243 (Stevens, J. concurring) (arguing that the Fifth Amendment does not apply in the pre-arrest context).

273. *Id.* at 243 (emphasis added).

274. *Id.* at 244. In the first footnote to his concurrence, Justice Stevens redacted the language of the Fifth Amendment, which reads “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” *Id.* at 241 n.1.

simply has no play before he is owed a *Miranda* warning—and a suspect only is owed a warning incident to custodial interrogation.²⁷⁵

Those federal circuits which bar the government from using a defendant's pre-*Miranda* silence in its case-in-chief rely primarily on a broad reading of *Griffin v. California*.²⁷⁶ *Griffin* concluded that the Fifth Amendment prohibits the prosecution from commenting on a defendant's decision not to testify at his trial.²⁷⁷ Some federal circuits, however, suggest that *Griffin* permits the conclusion that the Fifth Amendment protects a defendant's utterances (and silences) well before his trial and even before his arrest.²⁷⁸ This view, however, is an unjustified extension of both *Griffin* and constitutional law.

To illustrate, the Seventh Circuit, in *Savory v. Lane*, concluded that the government's use of the defendant's pre-arrest silence in its case-in-chief violated his rights under the Fifth Amendment because "*Griffin* remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest."²⁷⁹ Unfortunately, the court neglects to establish just how *Griffin* allows for the sweeping prohibition against the use of a defendant's silence before that silence is even compelled. Instead, it argued "that the right to remain silent . . . attaches before the institution of formal adversary proceedings" by noting that the language of the Fifth Amendment's privilege against self-incrimination speaks to all "persons" and not just "defendants."²⁸⁰ However, while the Court in *Miranda v. Arizona* did extend the Fifth Amendment to mitigate the coercion inherent to custodial interrogations, it limited its application to only compelled utterances (or silences).²⁸¹ And while the Court in *Griffin v. California* did hold that the Fifth Amendment forbids comment on the defendant's silence, the issue before the Court was limited to whether comment on the defendant's failure to testify violated the Fifth Amendment's privilege against self-incrimination.²⁸² *Griffin* simply did not

275. See *supra* Part II (discussing when a suspect is owed a *Miranda* warning).

276. See *supra* Part IV.A (discussing the federal circuits that ban the use of pre-*Miranda* silence to prove the defendant's guilt).

277. See *supra* note 115 and accompanying text (discussing *Griffin v. California*).

278. See *supra* note 115 and accompanying text (discussing *Griffin v. California*).

279. *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (finding *Griffin* protects pre-arrest silence); see also *supra* notes 167-73 and accompanying text (discussing the Seventh Circuit's view on the use of silence to prove guilt).

280. *Savory*, 832 F.2d at 1017. The court contrasted the right to counsel under the Sixth Amendment that attaches when the defendant becomes an "accused" with the language of the Fifth Amendment that reads, "[no] person shall." *Id.* (emphasis added). The Fifth Amendment, however, limits the application of the self-incrimination privilege only to persons "in any criminal case." U.S. CONST. AMEND. V. Presumably, the Seventh Circuit read "person" to mean any person who at any time can invoke the privilege.

281. See *supra* notes 69-74 and accompanying text (discussing *Miranda v. Arizona*).

282. See *Griffin v. California*, 380 U.S. 609, 611 (1965) (narrowing issue before the Court); see also *supra* note 115 and accompanying text (discussing *Griffin v. California*). Notably, Justice Stewart, in his dissenting opinion, did affirm that before determining whether the government is

speak to the admissibility of silence before the start of adversarial proceedings; but even if it did, without the requisite compulsion, the case does not support the idea that a defendant's pre-*Miranda* silence is barred by the Constitution.

B. The Due Process Clause of the Fourteenth Amendment Does Not Bar the Use of a Defendant's Pre-Miranda Silence in the Government's Case-in-Chief

In *Doyle v. Ohio*, the Court considered whether comment on a defendant's post-*Miranda* silence violated his right to due process under the Fourteenth Amendment.²⁸³ In that case, the government used the defendants' silence, observed after they were read the *Miranda* warnings, to impeach exculpatory stories first offered at trial.²⁸⁴ The Court held that the Due Process Clause of the Fourteenth Amendment forbade the use of the defendants' post-*Miranda* silence to impeach their credibility.²⁸⁵ The Court explained that silence in the wake of a *Miranda* warning is "insolubly ambiguous" since it could be viewed as a defendant's exercise of his right to remain silent.²⁸⁶ Because the warning implicitly assures the defendant that his silence will carry no penalty, the use of his silence against him breaches the government's promise to the defendant.²⁸⁷ That breach constitutes the foundation of a due process violation.

A few years after *Doyle*, the Supreme Court decided in turn *Jenkins v. Anderson* and *Fletcher v. Weir*.²⁸⁸ *Jenkins* considered whether comment on a defendant's pre-arrest (and pre-*Miranda*) silence violated his right to due process under the Fourteenth Amendment.²⁸⁹ Relying on *Doyle*, the Court concluded that the use of a defendant's pre-arrest silence to impeach him did not violate due process, because the defendant had not yet been promised that his silence would not be used against him.²⁹⁰ Instead, the Court directed each jurisdiction to

precluded from commenting on a defendant's silence, the Court must first determine whether the defendant's silence was compelled. *Griffin*, 380 U.S. at 620 (Stewart, J, dissenting) (noting that since the defendant was not compelled to remain silent, his constitutional right to remain silent was not violated).

283. See *supra* notes 106-11 and accompanying text (discussing *Doyle v. Ohio*).

284. See *supra* notes 106-11 and accompanying text (discussing *Doyle*).

285. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); see *supra* notes 106-11 (discussing *Doyle*).

286. *Doyle*, 426 U.S. at 619; see *supra* note 110 and accompanying text (discussing reasons why the prosecution cannot use a defendant's post-*Miranda* silence to impeach him).

287. See *supra* note 110 and accompanying text (discussing reasons why the prosecution cannot use a defendant's post-*Miranda* silence to impeach him).

288. See *supra* notes 122-27, 130-38 and accompanying text (discussing *Jenkins v. Anderson* and *Fletcher v. Weir*).

289. See *supra* notes 122-27 and accompanying text (discussing *Jenkins v. Anderson*).

290. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980). The Court also concluded that the use of a defendant's pre-arrest silence to impeach him did not violate his rights under the Fifth Amendment. *Id.* At issue was whether the use of the defendant's pre-arrest silence impermissibly burdened his Fifth Amendment right to remain silent. *Id.* While the Court elected not to consider whether or under what circumstances pre-arrest silence is protected by the Fifth Amendment, it did

resolve the issue under its own rules of evidence that weigh the probative value of the defendant's silence against any prejudice against the defendant which might result.²⁹¹ The Court also noted that allowing the government to impeach a defendant's credibility with his prior silence "may enhance the reliability of the criminal process" and "advances the truthfinding function of the criminal trial."²⁹²

Again, in *Fletcher v. Weir*, the Court held that use of a defendant's pre-*Miranda* silence to impeach him does not violate his due process rights under the Fourteenth Amendment because, in the absence of the affirmative assurances embodied in the *Miranda* warning, the defendant was never promised that his silence would not be used against him.²⁹³ While silence following a warning is normally so ambiguous as to have too little probative value to warrant its admission into evidence, silence preceding a warning carries no such impediment.²⁹⁴ As such, *Fletcher* observed that "[a] State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post arrest silence may be deemed to impeach a criminal defendant's own testimony."²⁹⁵ *Fletcher* confirmed that the use of a defendant's pre-*Miranda* silence against him is determined under routine rules of evidence and such use does not involve the Due Process Clause of the Fourteenth Amendment.

At least one federal court of appeals case that forbade the government to use a defendant's pre-*Miranda* silence in its case-in-chief argues that *Jenkins* (and presumably *Doyle* and *Fletcher*) only permits the use of silence to impeach a defendant who already waived his right to remain silent by choosing to testify in his own defense.²⁹⁶ In *United States v. Caro*, the Second Circuit concluded that "we are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."²⁹⁷ *Caro* seemed to consider dispositive how the

conclude, relying on *Raffel v. United States*, that the Fifth Amendment is not violated when the government uses a defendant's pre-arrest silence to impeach his credibility. *Id.*

291. *Id.* at 239.

292. *Id.* at 238. The Court noted that, under the Fifth Amendment, the use of a defendant's pre-arrest silence to impeach him is tied to his decision to testify at his trial and thus "cast aside his cloak of silence." *Id.* Quoting *Harris v. New York*, the Court wrote, "[h]aving voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately." *Id.* (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)). But, as Justice Stewart correctly notes in his concurrence, absent some element of compulsion, a defendant cannot hide under the Fifth Amendment for protection. *Id.* at 244 (Stewart, J., concurring).

293. See *supra* notes 130-38 and accompanying text (discussing *Fletcher v. Weir*).

294. See *Fletcher v. Weir*, 455 U.S. 603, 604-05 (1982) (per curiam) (contrasting the facts in *Doyle* with the case at bar).

295. *Id.* at 607.

296. See *supra* Part IV.A (discussing federal courts of appeal that forbid the use of silence in the government's case-in-chief)

297. See *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (noting that *Jenkins* was

government used a defendant's pre-arrest silence.

Whether the government uses a defendant's prior silence to impeach his credibility or to prove his guilt is a distinction without a difference, at least when analyzing the issue under the Due Process Clause. In fact, both the Sixth and Seventh Circuits (which concluded that the government may *not* comment on a defendant's pre-arrest silence in its case-in-chief under the Fifth Amendment) agree that the use of a defendant's pre-arrest silence in the government's direct case cannot violate the defendant's due process rights because, in the pre-arrest (and pre-*Miranda*) context, the government has not yet assured a defendant that his silence would not be used against him.²⁹⁸ The same logic that drove the *Jenkins* Court to dismiss a due process attack on the use of a defendant's pre-arrest silence to impeach him applies with the same force to the use of silence to prove his guilt.

The fundamental core of a *Doyle* violation lies in the government's assurances (or lack thereof) that silence will carry no penalty.²⁹⁹ To remain faithful to the constitutional principles articulated in *Doyle* and its progeny, no distinction logically can be drawn between how the government uses a defendant's pre-*Miranda* silence without extending the doctrinal foundations of the Due Process Clause well beyond its current applications. How the government uses a defendant's silence is simply unrelated to the threshold question that asks whether the government first assured the defendant that his silence would not be used against him. While silence may be "insolubly ambiguous," that determination is best left to the sound discretion of the trial court. The question is not whether the Due Process Clause prohibits the government's use of a criminal defendant's pre-*Miranda* silence, but whether the probative weight of that silence is greater than its prejudice to the defendant.

CONCLUSION

Miranda v. Arizona extended the core Fifth Amendment privilege against self-incrimination beyond the trial to protect criminal defendants subjected to custodial interrogations. Since the Fifth Amendment bars trial courts from exercising their contempt power to compel defendants to testify against themselves, the Court believed that police pressure exacted during the course of an interrogation could exert the same sort of coercion that the Constitution sought to prevent. As such, the Court required the government to first apprise a suspect of his right to remain silent and his right to counsel before a trial court

limited to the use of silence to impeach a defendant). Unfortunately, the Second Circuit fails to discuss why *Jenkins* appears to forbid the use of pre-arrest silence in the government's case-in-chief.

298. See *supra* Part IV.A (discussing Sixth Circuit and Seventh Circuit). The Fourth, Fifth, and Eleventh circuits agree that without the assurances embodied in the *Miranda* warning, the Due Process Clause does not forbid the government's use of a defendant's pre-*Miranda* silence in its case-in-chief. See *supra* Part IV.B (discussing the Fourth, Fifth, and Eleventh Circuits).

299. See *supra* Part III (discussing *Doyle*, *Jenkins*, and *Fletcher*).

could conclude that his statements were made voluntarily and, thus, admissible against him. *Miranda* and its progeny, however, linked the admissibility of a defendant's inculpatory statements to the coercion inherent to an interrogation. A suspect's responses made outside the context of an official interview, even if they are made after his arrest, are immune from a Fifth Amendment challenge since they fall outside the coercive atmosphere inherent to a custodial interrogation. While *Miranda* shields a defendant's unwarned statements made in the course of a custodial interrogation, it simply does not limit the admissibility of his statements or silence before he is compelled to speak. The Fifth Amendment, then, does not bar the government's use of a defendant's pre-*Miranda* silence in its case-in-chief so long as the government did *Mirandize* him before it interrogated him.

Doyle v. Ohio held that the government's use of a defendant's post-*Miranda* silence to impeach him violated his rights under the Due Process Clause of the Fourteenth Amendment.³⁰⁰ *Doyle* explained first that a defendant's post-*Miranda* silence is insolubly ambiguous, and thus its use is intolerably prejudicial.³⁰¹ Second, *Doyle* opined that a defendant is deprived due process when the government uses his silence against him after it assures him that his silence would carry no penalty.³⁰² Logically, the government's use of a defendant's pre-*Miranda* silence cannot violate due process because his silence was not induced by the government. Moreover, pre-*Miranda* silence, while ambiguous, is not intolerably ambiguous, because a defendant's pre-*Miranda* silence cannot be viewed necessarily as the defendant's assertion of his *Miranda* rights. The Fourteenth Amendment, then, does not bar the government's use of a defendant's pre-*Miranda* silence in its case-in-chief.

In conclusion, neither the Fifth nor the Fourteenth Amendments prohibit the government from using a defendant's pre-*Miranda* silence in its direct case against him. Despite this, silence is ambiguous, perhaps intolerably so. But the admissibility of a defendant's silence ought to be left to the sound discretion of the trial court in its application of the routine rules of evidence—and, however rare, the probative value of a defendant's pre-*Miranda* silence may sometimes outweigh its prejudicial impact. The Constitution, however, simply does not afford the defendant redress.

300. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

301. *Id.*

302. *Id.*

GOVERNMENT POWER UNLEASHED: USING EMINENT DOMAIN TO ACQUIRE A PUBLIC UTILITY OR OTHER ONGOING ENTERPRISE

SHELLEY ROSS SAXER*

INTRODUCTION

Ask most people what they think of a municipality using its eminent domain power to acquire a privately-owned utility company and the typical response is one of disbelief and sometimes, mild outrage. This power to convert public utilities from private to public ownership, however, has historically been available to state and municipal governments to secure lower power rates for local residents.¹ The impetus for this Article was the City of Corona's exercise of eminent domain power to acquire Southern California Edison in order to provide less expensive rates and more reliable electricity service to residents. Although the City eventually settled with Edison, the issues remain. Municipalities across the United States are considering using eminent domain to acquire private utility companies. What then are the limits on using the eminent domain power to acquire ongoing enterprises in order to provide public goods or services? This Article identifies and discusses some of the issues and constraints involved in private enterprise condemnations, particularly those involving privately-owned public utilities.

Government has long enjoyed the power to acquire property from unwilling property owners in order to further its citizens' public needs and interests. The source of this power stemmed from both historical and constitutional roots. From its beginnings, the United States adopted the English approach of requiring land owners to "return" property to the crown when needed for the public good. Then, with the addition of the Fifth Amendment Just Compensation Clause, the people were guaranteed that the government would compensate them for any private property taken to fulfill a public purpose.

Now, in most states, the eminent domain power is delegated, along with the state's police power, to municipalities and other local government units. Local government power is constrained by state statute and constitution, but the degree of constraint varies widely by state. In reaction to situations such as the Enron mess and the electric power problems in California, municipalities recently began

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1. See, e.g., *Pub. Serv. Co. of Colo. v. City of Loveland*, 245 P. 493, 498 (Colo. 1926) (holding that the city's exercise of eminent domain to acquire a privately-owned electric utility plant was properly exercised based on a 1903 ordinance and the city's fundamental power to condemn property for a public use). See also 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.06[40] (3d ed. 2004) (discussing New York condemnation statute, N.Y. PUB. AUTH. LAW § 1020-A, enacted "to facilitate conversion of a power company from private to public ownership").

exercising this power to acquire ongoing private utility businesses to bring supply and price stability to their citizens.² Land owners generally realize that the government has the power to condemn their real property for such purposes as expanding a highway. Yet, few business owners suspect that this power of condemnation extends to allow the local government to force a sale of their private enterprise.³

This Article examines both state and local government's use of eminent domain to acquire an ongoing utility company. The focus is on utility companies since they have experienced both public ownership and regulation, and only recently "deregulated" to allow private owners to run them competitively. However, an overriding concern remains—what is the limitation on government power after a municipality or state condemns a private business it determines can be run more efficiently as a public function?

Following this introduction, Part I discusses the history of industries that have been historically subject to public ownership or regulation and why state and local government officials have felt compelled to acquire these industries to respond to citizen needs. Part II outlines Fifth Amendment limitations and various state constitutional and statutory constraints on eminent domain power. Federal limitations such as the Dormant Commerce Clause, the Commerce Clause, the Tenth Amendment, the Supremacy Clause, antitrust laws, and the Contract Clause are explored in a forthcoming article.⁴ The Article concludes by suggesting that people can either limit or expand this government power through legislative action, and in some cases, state constitutional amendment. Social, economic, and political pressures will combine to either prevent or enable wide-scale nationalization and what some might refer to as "creeping statism"⁵ or "creeping economic socialism."⁶

2. Rich Saskal, *The Far Reach of Enron Prompts Push for Public Power in Oregon*, BOND BUYER, Sept. 26, 2003, at 1 (discussing Oregon's public power efforts and noting that in addition to several communities in California pursuing public utilities, the city of Great Falls, Montana, is attempting to create a municipal utility).

3. See, e.g., *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 841 (Cal. 1982) (noting that "[n]o case anywhere of which we are aware has held that a municipality can acquire and operate a professional football team, although we are informed that the City of Visalia owns and operates a professional Class A baseball franchise in the California League; apparently, its right to do so never has been challenged in court").

4. Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. (forthcoming June 2005).

5. *City of Oakland*, 646 P.2d at 845-46 (Bird, C.J., concurring and dissenting); see also RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RECONSTRUCTING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 41 (1999) ("In a series of advertisements run in the early 1960s, moreover, utilities implied that government operation of such power systems constituted a step 'down the road to socialism.'" (citation omitted)).

6. David Schultz & David Jann, *The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings*, 16 WM. MITCHELL L. REV. 383, 426-27 (1990) (suggesting that municipalities use eminent domain to gain control of assets to prevent a

I. THE COMPELLING CASE FOR PUBLIC OWNERSHIP AND GOVERNMENT CONTROL

A. *The City of Corona Responds to the California Energy Crisis*

The City of Corona (“Corona”) in Riverside County, California, filed a Complaint in Eminent Domain against Southern California Edison Company (“Edison”) on December 3, 2002, to acquire Edison’s integrated electric utility system to reduce its residents’ power bills.⁷ Edison had earlier rejected Corona’s offer to purchase the system, responding that its system was not for sale.⁸ Corona’s Complaint in Eminent Domain alleged that in April 2001, Corona established a “municipally-owned electric, natural gas, telephone, and telecommunications utility” pursuant to its alleged authority as a municipal corporation under Article IX, Section 9(a) of the California Constitution.⁹ This section permits a municipality to “establish, purchase and operate public works to furnish its inhabitants with light, water, power, heat.”¹⁰ Corona’s electric utility, authorized by the California Public Utilities Commission, already served some of Corona’s businesses and certain Los Angeles Unified School District facilities.¹¹ Corona claimed that the restructuring of California’s electricity market in January 1998, “created significant disruptions of California’s energy market, including higher rates, power outages, and rolling blackouts.”¹² Additionally, Corona alleged that Edison’s excessive rates and failure to maintain a safe and reliable distribution system adversely impacted Corona’s businesses and residents.¹³

Corona and Edison settled this litigation on May 14, 2003, leaving open the question of whether a municipality can use its eminent domain power to acquire a privately-owned utility and in turn “municipalize” the electric utility.¹⁴ Corona indicated that pending state energy legislation might make it harder to take over the electric distribution system and that Edison’s proposed rate reduction made the projected savings from municipal ownership less compelling.¹⁵

business from closing down or leaving a community).

7. See Complaint, *City of Corona v. So. Cal. Edison Co.*, No. 385551 (Cal. Sup. Ct., County of Riverside, Dec. 3, 2002) [hereinafter Complaint], available at <http://www.discovercorona.org/depts/electric>.

8. See *SoCal Ed. Fighting City of Corona’s Efforts to Municipalize Distribution*, POWER MARKETS WK., Jan. 13, 2003, at 25.

9. Complaint, *supra* note 7, at 4.

10. *Id.*

11. *Id.*

12. *Id.* at 3.

13. *Id.* at 6.

14. *Corona Decides to Stay with SoCal Ed, Will Drop Eminent Domain Lawsuit*, ELECTRIC UTIL. WK., May 19, 2003, at 19.

15. *Id.*

Other municipalities in Southern California effectively operate their own electric utilities, offering residents and businesses reasonable rates.¹⁶ The City of Glendale, for example, received an A1 rating from Moody's on its Electric Revenue Bonds because of its strong financial operations and generating capacity.¹⁷ Even with the recent scandals plaguing the industry, an internal investigation of a Glendale agreement with Enron determined that "Glendale Water and Power had no improper involvement in the Enron trading plays."¹⁸ Despite this affirmation, both Glendale Water and Power and Los Angeles' city-run utility, the Department of Water and Power (DWP), are currently under investigation by federal regulators to determine whether they and other municipalities conspired to drive up power prices during "California's electricity meltdown in 2000-2001."¹⁹ Although not free from criticism that municipal utilities took advantage of the situation, these city-run utilities managed to avoid blackouts and rate increases. Concerns still remain that the privately-owned energy companies and utilities were involved in schemes to manipulate California's electricity markets during the 2000-2001 energy crisis.²⁰

As one of the first states to embrace the market enterprise approach of the Public Utility Regulatory Policies Act ("PURPA") in the late 1970s, California welcomed new independent producers of power to meet the rising electricity demand not addressed by sufficient new power plant construction.²¹ Following the passage of the Energy Policy Act of 1992, which encouraged competition, the California Public Utilities Commission began restructuring the state's utility system, including passing legislation that deregulated the electric utilities by 1998.²² Other states watched California's restructuring experience in anticipation of emulating the market enterprise approach of the Energy Policy Act.²³ By the

16. See Complaint, *supra* note 7, at 6 (Corona alleged that the cities of Riverside and Anaheim offer lower rates and Riverside has used these lower rates to attract businesses to move from Corona to Riverside.).

17. Press Release, Moody's Investor Serv., Moody's Assigns A1 Rating to Electric Revenue Bonds of Glendale, California, (Jan. 21, 2003), available at 2003 WL 7902907.

18. Kelly Yamanouchi, *Los Angeles Glendale Finds No Impropriety in Its Enron Deal*, L.A. TIMES, July 13, 2002, at B4.

19. Richard Nemec, *DWP Really Has A Lot of Explaining To Do*, L.A. DAILY NEWS, Mar. 11, 2003, at N11. See also Rebecca Smith, *Regulators Find "Epidemic" of Market Manipulation in California Energy Crisis*, WALL ST. J., Mar. 27, 2003 at A3 (noting that "[f]ederal energy regulators said they found 'epidemic' efforts to manipulate electricity and natural-gas markets during California's 18-month-long energy crisis" and that the Los Angeles Department of Water and Power is one of the companies included in the Federal Energy Regulatory Commission's staff recommendation that "some big power suppliers explain why their behavior didn't constitute illegal manipulation of Western energy markets").

20. Mark Martin, *State Hunts for Goods on Energy Firms; Lawyers Try to Show Market Manipulation*, S.F. CHRON., Jan. 20, 2003, at A1; Smith, *supra* note 19, at A3.

21. HIRSH, *supra* note 5, at 93-100.

22. *Id.* at 239.

23. *Id.* at 248 (noting that California's strong economy and the presence of large investor-

end of 1996, “four states had passed restructuring laws, and all but a few states had launched legislative or regulatory investigations as preludes to introducing utility system reforms.”²⁴

Now recovering from the energy troubles of 2000-2001, other states and their municipalities again are watching California’s newest power utility restructuring. What went wrong with the rapid deregulation of the electric utility system? Was there a market failure that prevented the market enterprise theory from succeeding in a competitive structure? As policymakers and the courts sort through the allegations of conspiracy and the evidence of market manipulation, municipalities across the nation, and even other nations, are attempting to determine whether private ownership, public ownership, regulation, or deregulation is the appropriate model for power utilities operations.

The decision whether to “municipalize” or “privatize” a utility has historically perplexed policymakers, resulting in a variegated history of private ownership, public ownership, regulation, and deregulation or restructuring of the utilities.²⁵ Deciding whether it makes fiscal sense for a municipality to acquire a private utility company through the eminent domain process requires careful study and analysis.²⁶ However, once a city can justify to its elected officials that operating the utility will significantly benefit its citizens, the municipality has a responsibility to act in the best interests of its citizens and respond as the City of Corona did, so long as state statutory and constitutional law allow such a condemnation.²⁷

It is not the purpose of this Article to advocate either public or private ownership of utilities or to opine regarding the efficacy of either regulating or restructuring certain industries.²⁸ Individual states and municipalities must make this determination on a case-by-case basis using past history, economic theory,

owned utility companies and non-utility energy producers made it a good candidate for a “workable competitive market”).

24. *Id.* at 260.

25. *See, e.g., id.* at 14 (discussing the municipalization model of the late 1800s and early 1900s where “city governments purchased the assets of utility companies and operated them for the supposed benefit of the citizens”).

26. *See, e.g.,* City of Corona, Feasibility Study (Nov. 2002), *available at* <http://www.discovercorona.org/depts/electric> [hereinafter Feasibility Study] (the analysis performed by Corona prior to recommending action to the City Council). *See also* Schultz & Jann, *supra* note 6, at 410 (observing that “each community will have to embark on a fairly sophisticated financial analysis of a business before making the decision whether to pursue ownership of that business through eminent domain”).

27. *See* Feasibility Study, *supra* note 26, at 3 (“Corona’s municipalization of the electric utility system can be physically and logistically accomplished, would be financially viable, and would result in significant overall savings to the City’s ratepayers for all rate classes in all price scenarios under all options.”)

28. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1400-03 (1998) (discussing the debate as to whether natural monopolies should be regulated).

and political perspective. However, by exploring potential legal constraints on the government's eminent domain power and understanding the historical perspective of utility ownership and regulation, this Article will hopefully serve to guide municipalities, utilities, public officials, courts, and citizens in approaching these issues.

B. The Regulatory History of Utilities and Other Regulated Industries

Much is written about public utilities' regulation, deregulation, restructuring, and, indeed, there is a multitude of specialized legislation and case law, both federal and state, dealing with utilities.²⁹ In his 1887 essays, Henry Carter Adams identified three classes of industries, two of which were adequately controlled by competition and one of which required state control because the industry type was by nature a monopoly.³⁰ For many years, there was general agreement that industries considered to be "natural monopolies" included: the water supply industry; the transportation network of waterways, roads, and railroads; the petroleum pipelines; the light and power industries; the local transit industry; and the telecommunications industry.³¹ Recently, however, commentators question whether utility companies *are* natural monopolies in light of technological innovation making market competition possible through small-scale generating equipment.³² While the individual histories of these "natural monopoly" industries differ from one another in significant ways, there are some general trends common across these industries.³³

First, as presumed natural monopolies, these industries have a history of public control and are subjected to regulation through common law remedies, charter, franchise and statutory limitations.³⁴ This public control was initially

29. See, e.g., Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"); IDAHO CODE § 61-01 to 61-1508 (Michie 2002); HIRSH, *supra* note 5, at 2; Kearney & Merrill, *supra* note 28.

30. See WILLIAM K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 3 (1967) (citing HENRY CARTER ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION (1887), reprinted in DORFMAN, TWO ESSAYS BY HENRY CARTER ADAMS 57-133 (1954)).

31. See generally *id.* at 6-22; see also Kearney & Merrill, *supra* note 28, at 1327 (analyzing those industries included within the "classic definition of regulated industries" including "four 'common carriers'—railroads, airlines, trucks, and telecommunications companies—and two 'public utilities'—electricity and natural gas").

32. HIRSH, *supra* note 5, at 120 (observing that "[t]hough PURPA brought the issue of natural monopoly to a head in the 1980s, academic critics had questioned the value of the principle earlier"). See also Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 452 (2002) ("PURPA stimulated a deeper rethinking of the concept of natural monopoly.").

33. See Tomain, *supra* note 32, at 443 (noting that "it is the degree of protection that distinguishes government treatment of some industries from the treatment of others" and "that the degree of government intervention changes over time").

34. JONES, *supra* note 30, at 22-31 (discussing common law rules applied to common carriers and innkeepers and limitations on industries created by state charters, municipal franchises, and

shared by state and municipal governments, which granted state charters and municipal franchises. These charters and franchises were the basis of the “regulatory contract” whereby the public’s need for utility services was satisfied by private companies. The private companies built the infrastructure and supplied nondiscriminatory service in exchange for “the opportunity to earn a competitive return.”³⁵ By the late 1800s, control shifted to municipalities since much of the need for these utilities was generated by urbanization at the city level and required use of the city streets.³⁶ However, once this “promotional stage” established service to the residents, cities and states discovered that the existing charters and franchises did not provide sufficient incentive for reduced rates and increased quality of service.³⁷

The next trend was a move toward “encouraging competition as a means of protecting the interests of the public.”³⁸ For example, the electric industry at its beginning in the late 1800s “was an unregulated competitive industry.”³⁹ Although this trend occurred at different times for different industries, “most of the natural monopoly industries went through a second or ‘competitive stage’ in which charters and franchises were freely granted to all comers.”⁴⁰ This competitive stage was not terribly successful as price wars resulted in deteriorated operations and service. Additionally, companies began either consolidating or fixing prices in violation of weak antitrust regulations.⁴¹ It was at this juncture in the late 1800s and early 1900s, that both the municipalization model and the regulatory model were explored as alternatives to a free market because the franchises were subject to political corruption.⁴² A new approach was needed to respond to this corruption. Municipal power companies only constituted approximately “30 percent of the nation’s electricity suppliers” by 1907,⁴³ but the regulatory model still prevailed as economists argued that these “natural monopolies” required governmental oversight. During this time, critics

statutory restrictions).

35. J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 898 (1996).

36. JONES, *supra* note 30, at 31-32.

37. *Id.* at 33.

38. *Id.*

39. Tomain, *supra* note 32, at 444.

40. JONES, *supra* note 30, at 33.

41. *Id.* at 33.

The result of reliance upon competing companies was frequently (a) periods of price competition and instability in operations, followed by (b) suppression of competition by agreement among the parties, resulting in (c) higher prices than previously to provide coverage for the higher costs of multiple operations and duplicated investment, setting the stage for (d) further entry as the operations of the incumbents became profitable once more.

Id.

42. HIRSH, *supra* note 5, at 14-15.

43. *Id.* at 15.

of municipal ownership feared corrupt political forces in city management and the end of free enterprise in favor of municipal socialism.⁴⁴

The third or “regulatory” trend resulted from the failure of the competitive stage to protect the public from abuses by the natural monopoly industries.⁴⁵ The public utility regulation was based in contract law with the state or municipality allowing the private utility to earn a competitive rate of return in exchange for the utility submitting to regulatory restrictions.⁴⁶ The agreement, also called “the utility consensus,” permitted investor-owned power companies to sell electricity without competition in exchange for supplying consumers with good service at good rates.⁴⁷ The Interstate Commerce Act, enacted in 1887, created an administrative agency to regulate private companies through close monitoring, regulated rates, and limitations on industry entry and exit.⁴⁸ This regulatory model, designed to ensure “just, reasonable, and non-discriminatory rates and practices,” was subsequently imposed on the “shipping, stockyard, telephone, telegraph, trucking, electric, gas, and aviation industries.”⁴⁹ The regulatory stage lasted for almost a century,⁵⁰ but in the last few decades a return to the competitive model has occurred in an effort to improve consumer welfare by again encouraging provider competition.⁵¹

The transformation from regulation to “competition through regulation”⁵² began in the 1960s when economic and political factors combined, creating a

44. *Id.* at 15-26, 38, 40-41 (discussing fights in the early 1900s to prevent municipal ownership and attacks made by the power company publicists in advertising campaigns against supporters of government-run utilities, calling them “‘Bolsheviks,’ ‘reds,’ or ‘parlor pinks’”).

45. JONES, *supra* note 30, at 29.

46. Sidak & Spulber, *supra* note 35, at 887 (explaining that these restrictions included “price regulations, quality-of-service requirements, and common-carrier regulations”). This article cites *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) and *Munn v. Illinois*, 94 U.S. 113, 124 (1877) as evidence that the concept of regulatory contract has a historical lineage in contract. *Id.* at 891. See also Tomain, *supra* note 32, at 446 (describing the regulatory compact as imposing obligations on both the utility and the government where “[i]n exchange for a government-protected monopoly, the utility lets government set its prices through ratemaking”).

47. HIRSH, *supra* note 5, at 1.

48. Kearney & Merrill, *supra* note 28, at 1325 (citing Interstate Commerce Act, 24 Stat. 379 (1887)).

49. *Id.* at 1333-34 (internal citations omitted).

50. *Id.* at 1329 (observing that the dominant model of regulation which began in the late nineteenth century has been dramatically changing in the last few decades to allow “consumer choice among multiple competing providers”).

51. *Id.* at 1325-26; see also Tomain, *supra* note 32, at 449-50 (noting that there are regulatory cycles where a competitive business consolidates to reduce competition, there is a competitive failure, the government regulates to correct the failure, there is a regulatory failure, and then policymakers return to the competitive model).

52. Kearney & Merrill, *supra* note 28, at 1329 (describing the transformation from “the original paradigm of regulated industries law . . . to a new paradigm emphasizing, to the maximum degree feasible, consumer choice among multiple competing providers”).

background where critics questioned the efficacy of our traditional regulatory structures.⁵³ The three stresses of “technological stasis, the energy crisis, and the environmental movement”⁵⁴ brought about the end of the relatively stable regulatory phase.⁵⁵ In response, the Public Utility Regulatory Policies Act (PURPA)⁵⁶ was enacted in 1978 as part of the National Energy Act⁵⁷ and encouraged market-based rates for conventional fuels.⁵⁸ In the energy sector, the “utility consensus” was weakened as free market principles replaced the concept of natural monopoly power and traditional regulation was questioned.⁵⁹

First to reject the traditional regulatory structure in favor of a market approach was the airline industry with the enactment of the Airline Deregulation Act of 1978.⁶⁰ Airline industry deregulation was followed by railroad deregulation in 1980 with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976,⁶¹ the Staggers Rail Act of 1980,⁶² and finally the abolishment of the Interstate Commerce Commission in 1996.⁶³

By the 1980s, the telecommunications business transitioned to a competitive marketplace,⁶⁴ and the natural gas industry was well on its way. The natural gas industry unbundled its services by taking advantage of open access to interstate pipelines to allow producers to compete for industrial end-users “using the interstate pipeline as a provider of transportation service only.”⁶⁵ Producers could now sell natural gas without having to maintain their own pipelines. Under

53. Tomain, *supra* note 32, at 450 (discussing regulation of the electric industry and the political and economic events leading to “unsettling the electric industry and its customers”).

54. HIRSH, *supra* note 5, at 68-69 (describing the effects of these stresses as utility companies were unable to reduce prices as technological improvements were limited, the energy crisis created an unsettled market for power as consumers reduced consumption, and the growth of environmental legislation and regulation constrained the power of utility managers).

55. See Andrew P. Morriss, *Implications of Second-Best Theory for Administrative and Regulatory Law: A Case Study of Public Utility Regulation*, 73 CHI.-KENT L. REV. 135, 143 (1998) (referring to the period between World War II and 1970 as “‘an era of stability’ for both the regulators and regulated in the public utility field”).

56. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 26, 42, and 43 U.S.C.).

57. Tomain, *supra* note 32, at 451.

58. See *id.*

59. HIRSH, *supra* note 5, at 71.

60. Kearney & Merrill, *supra* note 28, at 1335; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 40101 (2000)).

61. *Id.* (citing Pub. L. No. 94-210, § 202(b), (c)(i), 90 Stat. 31, 35 (1976) (codified as amended at 49 U.S.C. § 10709(c) (1994))).

62. *Id.* at 1336 (citing Pub. L. No. 96-448, 94 Stat. 1895.)

63. *Id.* (quoting the House Committee as stating “that ‘the railroad industry has operated in an essentially deregulated environment’ since 1980”) (citing H.R. Rep. No. 104-311, at 90 (1995)).

64. *Id.* at 1341-42 (discussing the unbundling of goods and services and separating long-distance services from local services).

65. *Id.* at 1345.

this new model, the main function of the regulator “[was] to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users” rather than to oversee the industry to protect consumers.⁶⁶ In summarizing “the central tenets of the new paradigm in regulated industries law,”⁶⁷ Kearney and Merrill observed that “[i]n industries and segments where services have been bundled together through vertical and horizontal integration, this means that segments that can be provided competitively must be unbundled and opened to competition (long-distance telephony, natural gas production, electricity generation).”⁶⁸

Calling this new stage of deregulation the “great transformation,” Kearney and Merrill proposed “that a wide-ranging transformation sharing many common features is taking place throughout regulated industries law.”⁶⁹ They also suggested that this trend “is being driven by deep-seated economic and social forces”⁷⁰ including an increasing perception of regulatory failure and a decreasing perception of market failure.⁷¹ Hirsh noted, in his book on the history of the electric utility system, that “[b]y the 1990s, participants moved tentatively toward creation of a new consensus that sanctified the concept of competition and rejected the legitimacy of natural monopoly and regulation.”⁷² Certainly, the push toward deregulation of electricity was preceded by the deregulation of airlines and natural gas along with a favorable economic and political perspective in the country regarding deregulation.⁷³ For the electricity industry, “[t]he cumulative failures of regulation, coupled with remarkable innovations rendering old technology inefficient or obsolete, suggested that new efficiencies could be realized by introducing competition to certain sectors of the electricity industry.”⁷⁴

66. *Id.* at 1361.

67. *Id.* at 1363.

68. *Id.* at 1363-64 (also noting that where industries compete through market transactions, “the focus of the agencies necessarily turns to those market segments that have natural monopoly characteristics”).

69. *Id.* at 1383.

70. *Id.*

71. *Id.* at 1399.

72. HIRSH, *supra* note 5, at 2. See also Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 55 n.*, 65 (1968) (concluding that “the rivalry of the open market place disciplines more effectively than do the regulatory processes of the commission” and crediting R.H. Coase at the outset of the article “who was unconvinced by the natural monopoly argument long before this paper was written”).

73. Fred Zalzman & David Nichols, *Competition, Environment, and the Electric Industry: A Special Symposium on Restructuring at the Crossroads*, 18 PACE ENVTL. L. REV. 287, 288 (2001).

74. Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1277 (1998).

C. *Regulatory Reform or a Return to Public Ownership?*

By the end of 2000, “twenty-four states, including most of the larger states, had decided to deregulate electricity generation.”⁷⁵ However, in the face of serious problems with this deregulation of electric power,⁷⁶ policy makers must decide whether such restructuring should continue or whether we should return to government controlled regulatory safeguards.⁷⁷ Perhaps market failures in a restructured utility industry will justify either regulation or municipalization as we once again face the decision of which model best addresses problems of corruption and abuse of power in a competitive environment.⁷⁸ Recent commentators conclude that “[t]he mistaken experiment in California and the gaffs of Enron notwithstanding, electricity restructuring is good policy and is one to which we should be committed for our energy future”⁷⁹ while attributing the Enron situation to failures of corporate, not regulatory law.⁸⁰ However, such recent events occurring with the electric utilities may change the public’s perception about the advantages of deregulation. The public might well conclude that the corporate excesses resulting from competitive greed constitute a market failure justifying more public control of utilities.

1. *The Deregulation Failure and a Call for Regulation.*—The deregulation of the electric utility industry involved unbundling electricity transmission from its generation.⁸¹ This transformation from the state ownership or regulatory model of a “natural monopoly” to a privatized model of competing industry

75. Zalcman & Nichols, *supra* note 73, at 288. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 3204 (West 2001) (Maine enacted statute to force the divestiture of general assets and generation-related activities by investor-owned electric utilities); MASS. GEN. LAWS ANN. ch. 40A, § 3 (2003); Act of Nov. 25, 1997, ch. 164, 1997 Mass. Acts § 1(f) (Massachusetts in its 1997 amending act for zoning powers stated that “the introduction of competition in the electric generation market will encourage innovation, efficiency, and improved service from all market participants, and will enable reductions in the cost of regulatory oversight.”).

76. Zalcman & Nichols, *supra* note 73, at 288-89 (discussing restructuring problems such as high unregulated generation prices, lack of consumer choice of non-utility power suppliers, and fear that environmental benefits of restructuring may not be realized).

77. Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1768-69 (2002) (observing that California as “the first state to deregulate retail power markets on a mass scale, saw repeated months of power interruptions”).

78. See HIRSH, *supra* note 5, at 227 (discussing how market failure may justify governmental oversight under the public interest theory of regulation which holds that “the proper task of economic regulation is to intervene where competitive forces are too weak to defend the public interest unaided”) (quoting Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. OF MGMT. SCI. 155, 335-58 (1974)).

79. Tomain, *supra* note 32, at 474.

80. Rossi, *supra* note 77, at 1768.

81. Kearney & Merrill, *supra* note 28, at 1354-5 (quoting RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES* 350 (3d ed. 1994)).

components faced major issues. Pricing must encourage investment in every segment of the industry and transmission must allow for the easy movement of electricity to consumers.⁸² Additionally, electric utilities must deal with the “stranded costs”⁸³ of capital investments originally made with the promise of maintaining a regulated monopoly.⁸⁴ “It would breach the regulatory contract for the regulator to make unilateral changes in regulation that might prevent a utility from recovering the economic costs of investments that it made to discharge its regulatory obligations to serve.”⁸⁵ These so-called stranded costs may result when regulated industries are required to provide open access of their facilities to competing producers, who have not made the same capital investments to support the infrastructure required for distribution.

Although competition in energy production may have been a welcome development, appropriate and continuing investment in the delivery system is necessary to assure reliability and availability of electricity.⁸⁶ The need for state oversight or participation is also critical because of the nature of industry. Electricity cannot be stored so the consumer is dependent on the supplier and since “the industry depends overwhelmingly on public assets such as rivers, land accessibility, and mineral or petroleum resources . . . it has far-reaching impact on the environment.”⁸⁷

Why has a pioneering state such as California not achieved the proper mix of competitive enterprise and state oversight to successfully transition from a regulated industry to a market-driven utility company?⁸⁸ One expert concluded

82. Tomain, *supra* note 32, at 469-70 (discussing how competition requires access to the transmission system, but that congestion of the transmission system may result if investments are made in the generation segment, but not in transmission capacity).

83. Steven Ferrey, *Exit Strategy: State Legal Discretion to Environmentally Sculpt the Deregulating Electric Environment*, 26 HARV. ENVTL. L. REV. 109, 142 (2002) (proposing the use of exit and entrance fees to recover from electric consumer stranded costs, which are “the undepreciated book value of generating facilities not recovered in the price of their sale to new owners at the time of restructuring”).

84. Sidak & Spulber, *supra* note 35, at 861 (discussing the problem of recovering stranded costs when transitioning from a monopoly to competition).

85. *Id.* at 884.

86. Tomain, *supra* note 32, at 470.

87. Francis N. Botchway, *The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends*, 21 U. PA. J. INT’L ECON. L. 781, 784-85 (2000); see Tomain, *supra* note 32, at 473-74 (concluding that regulatory oversight will be required to monitor a restructured electricity market to avoid market power concentrations and that restructuring may actually result in more rather than less regulation); see also Timothy P. Duane, *Regulation’s Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 477 (2002) (noting that the “lack of storage capability increases the likelihood of both volatile prices and periodic shortages”).

88. See Zalzman & Nichols, *supra* note 73, at 290 (noting that “[u]nexpected price increases in California, New York, and elsewhere are creating huge uncertainty about the impact of electric industry restructuring on consumer interests”).

that when state, rather than federal, regulatory oversight is employed, “state politics is more likely to lead to dysfunctional markets than national approaches to restructuring.”⁸⁹ Instead, “[t]he law of regulatory federalism—defined broadly to include federal preemption doctrine, the dormant commerce clause, and state action immunity to antitrust enforcement—should find ways to encourage desirable participation and discourage undesirable interest group capture of the state political process.”⁹⁰ These federal doctrines are not within the scope of this Article, but can act as major constraints on state eminent domain power.⁹¹

One of the most thoughtful articles addressing the California energy failure was written by Dr. Timothy P. Duane, while a law student at Boalt Hall. At the time, he was also an Associate Professor of Energy and Resources at University of California, Berkeley, and had served as a senior policy consultant to the California Public Utilities Commission from 2000 to 2001. Duane analyzed California’s experience and offered guidance, based upon this experience, to other states involved in efforts to restructure the electricity industry.⁹² According to Duane, the key features of the California system design that contributed to the 2000-2001 crisis were: 1) “a market design that required all purchases and sales to go through a single ‘transparent’ market”⁹³ that would discourage participants from monopoly abuse while allowing the benefits of competition but which in practice “seriously limited long-term contracts, and . . . was especially subject to gaming and market manipulation;”⁹⁴ and 2) an attempt “to recover the so-called ‘stranded costs’ of past investments by the investor-owned utilities,”⁹⁵ but without a provision to allow utilities to recover costs that exceeded an agreed upon rate cap and with inherent incentives to avoid long-term contracts in favor of less risky purchases through the spot market.⁹⁶

California’s market system design flaws, growing demand, decreased power supply, a manipulation of natural gas prices, of physical withholding of energy generation, “decreased availability of air quality emission offsets in southern California,”⁹⁷ and the Federal Energy Regulatory Commission’s (FERC’s) failure to “enforce the law and discipline the anti-competitive behavior driving the

89. Rossi, *supra* note 77, at 1769-70 (relying on “three recent books on the history of regulated industries to address what went wrong in the turn toward deregulation of electric power,” which include: CHARLES R. GEISST, *MONOPOLIES IN AMERICA: EMPIRE BUILDERS AND THEIR ENEMIES FROM JAY GOULD TO BILL GATES* (2000); HIRSH, *supra* note 5; PAUL W. MACAVOY, *THE NATURAL GAS MARKET: SIXTY YEARS OF REGULATION AND DEREGULATION* (2000)).

90. Rossi, *supra* note 77, at 1770.

91. Saxer, *supra* note 4.

92. Duane, *supra* note 87, at 539-40.

93. *Id.* at 503.

94. *Id.* at 499.

95. *Id.* at 501.

96. *Id.* at 503.

97. *Id.* at 515.

[price] increases”⁹⁸ are all factors that contributed to the 2000-2001 crisis.⁹⁹ Unless these conditions are corrected, Duane concluded that this crisis might repeat itself in the future.¹⁰⁰

Duane also pointed out that California is not alone in experiencing problems with restructuring.¹⁰¹ He noted that other states such as Pennsylvania, New Jersey, Maryland, New York, and Texas also suffered recent price increases, physical capacity decreases, and even blackouts.¹⁰² In June 2000, New York experienced a dramatic price increase of 30% in the average wholesale price of electricity following New York’s efforts to deregulate.¹⁰³ The expectation that competition would lead to lower prices drove New York’s move to deregulate, but policymakers also realized that issues such as stranded costs, environmental concerns, and consumer protection would need to be addressed.¹⁰⁴ Since deregulation efforts began in 1996 the electricity prices in New York have not declined.¹⁰⁵ Despite not meeting the goal of lowering prices, at least one commentator observed that it is not necessarily the concept of deregulation that is the problem, but rather, perhaps, the design of this restructuring.¹⁰⁶ Instead of full marketplace competition, New York’s structure is one of “regulated deregulation” and as such may require more time to allow an evolution from regulatory control to supervision of a competitive market.¹⁰⁷

There is a strong argument for a return to regulation. “[T]he concerns that led to regulation in the first place—monopoly power and the threat of market manipulation—are still real issues today.”¹⁰⁸ It is especially a concern for the electric industry, which “is too susceptible to abuse to be left free of regulatory oversight.”¹⁰⁹ The August 2003 shut down of a major power grid in the Northeast, Midwest, and Canada is a stinging reminder of the dependency of

98. *Id.* at 516.

99. *Id.* at 509-23.

100. *Id.* at 524.

101. *Id.* at 494.

102. *Id.*

103. Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911, 912 (2002).

104. *Id.* at 914-15.

105. *Id.* at 923.

106. *Id.* at 912, 924-30 (noting that New York has not really deregulated electric power companies, but has instead replaced it with a different regulatory system—one still under government control).

107. *Id.* at 931 (warning that “[t]he critical challenge will be to resist efforts to move away from marketplace incentives and back towards more regulatory control”); *see also* Kearney & Merrill, *supra* note 28, at 1325 (noting that recent changes in the natural gas and electric industries do not end regulation, but instead transform the previous model of regulation, allowing competition through regulation).

108. Duane, *supra* note 87, at 535 (quoting Paul Krugman, *Enron Goes Overboard*, N.Y. TIMES, Aug. 17, 2001, at A19).

109. *Id.* at 536.

these systems on centralized equipment and the need to invest in the grid infrastructure to keep it in good operation.¹¹⁰ Following the blackout, FERC Chairman Pat Wood spoke in favor of continuing regional oversight of the U.S. transmission system and stressed the need to ensure adequate infrastructure.¹¹¹ After this U.S. and Canadian blackout, even governments in Europe and Asia were re-evaluating their plans for deregulation in light of the possibility of widespread power outages.¹¹²

Another solution to some of the recent restructuring problems is to nationalize the electric utilities even though “we all ‘know’ that nationalizing industry is un-American and that governments can never run industries as cost-effectively as private enterprise.”¹¹³ The eminent domain approach to nationalization may not have received serious consideration in 2001 by California’s former Governor Gray Davis at the state level during the California energy crisis, but municipalities across the nation are now poised to seize utilities as a way to stabilize supply, increase reliability, and offer reasonable rates to their citizens.¹¹⁴

Municipalities throughout the United States are forming public utility districts and attempting to negotiate purchases of privately-owned utility companies, with the power of eminent domain supplying a fallback position if

110. See David Hanners, *Transfer of Power, XCEL Wants to Turn over Its Transmission Lines to a New Company, but Regulators Worry About Losing Control*, ST. PAUL PIONEER PRESS, Aug. 31, 2003, at D1 (discussing concerns about the nation’s electric grid following the blackout).

111. Rob Thormeyer & Kathy Fraser, *Wood Commends Regional Grid Oversight, Says FERC Waiting for Congress to Act*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 25, 2003, at p.10.

112. Chip Cummins et al., *A Global Journal Report: U.S. Blackout Prompts Others to Examine Power*, WALL ST. J., Aug. 18, 2003, at A9.

113. Duane, *supra* note 87, at 527-28 (explaining that California’s then Governor Davis did not treat this solution as a viable option, although “Republican CPUC [California Public Utilities Commission] Commissioner Richard Bilas, who was appointed by Governor Pete Wilson and calls himself ‘a free market economist’ (with a Ph.D. in economics), concluded in January 2001 that condemnation was necessary when the CPUC was finally forced to raise retail rates”); see also Kearney & Merrill, *supra* note 28, at 1403-04 (suggesting as one of the “three ideal-typical trajectories for future evolution” of regulated industries a reversion of the legal system “toward a system that more closely approximates the original paradigm (or perhaps even sees state ownership of public utilities)”).

114. See Duane, *supra* note 87, at 537 (“[T]he Governor should have seized the former utility power plants (all ‘in-state’ facilities owned by ‘out-of-state’ companies) under his emergency powers to stop the price gouging and rolling blackouts. If ever the use of ‘police power’ was warranted, this was it.”); see also Kevin G. Glade, *CP National Corp. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Power Systems*, 1982 UTAHL. REV. 913, 915-16 (1982) (discussing advantages of municipal power including: citizen voice in utility management and local control of an essential community service; economic benefits for the community; and lower rates based on savings from financing through tax-exempt bonds, exemptions from income taxation, and preferred governmental status from federal facilities).

negotiations fail.¹¹⁵ Two distinct efforts are currently under way to municipalize Oregon's largest electric utility by a referendum action creating a public utility district with condemnation powers and by the City of Portland purchasing the privately-owned Portland General Electric company.¹¹⁶ These efforts were fueled by the Enron issues and both seek to fulfill the same goal of public ownership in order to lower rates and provide service reliability.¹¹⁷ After experiencing problems with Montana's largest provider, NorthWestern Energy, the city of Great Falls, Montana is also pursuing the idea of publicly owned power in order to provide its citizens with a stable supply of electricity at reasonable rates.¹¹⁸ The city of Nashua in New Hampshire is negotiating with Pennichuck Corp., the owner of a local water company, to purchase the company and then transfer ownership of it to a regional water district created by neighboring New Hampshire communities.¹¹⁹

A final example of the current trend toward municipalization can be found in Massachusetts where cities are voting to support state law changes to clarify a town's right to municipalize.¹²⁰ By passing a bill that "explicitly states that the incumbent utility must sell its assets to the municipality, once a fair value has been established for the existing infrastructure" cities and towns are hoping to own their own electric companies and take over electricity distribution.¹²¹ On the other hand, the privately-owned utility companies fear such government ownership¹²² and have resisted selling their assets to cities arguing that public

115. See, e.g., Christina Boyle, *State Waits to Grant \$7.9 Million Loan*, SANTA FE NEW MEXICAN, July 9, 2003, at E1, available at 2003 WL 57261856 (Eldorado Area Water and Sanitation District in New Mexico is attempting to purchase the water utility, but litigation which includes a claim by local developers that the district has no legal authority to condemn a public utility may make it difficult for the district to either purchase or condemn the utility); Kevin Leininger, *Need for Vote on Utility is Challenged, A Referendum Isn't Necessary to Buy Part of AquaSource*, City Officials Argue, FORT WAYNE NEWS SENTINEL, May 9, 2003, at E1 (discussing attempt by City of Fort Wayne, Indiana, to purchase part of a private utility for water and sewer service and noting that city could use its eminent domain power if a settlement on purchase price is not reached).

116. Saskal, *supra* note 2, at 1.

117. *Id.*

118. *Id.* (noting that the parent company NorthWestern Corp. filed for Chapter 11 bankruptcy on September 14, 2003); see also Mike Dennison, *Reaction to City Utility Proposal Mixed*, GREAT FALLS TRIB., Aug. 22, 2003, at 5A (discussing Great Falls' attempt to create a city-owned electric utility).

119. James Vaznis, *Water Company Purchase Talks Begin*, BOSTON GLOBE, Sept. 11, 2003, at 5.

120. Mairgreed Gray, *Oxford Selectmen Back Electric Plan*, WORCESTER TELEGRAM & GAZETTE, Oct. 23, 2003, at B2.

121. *Id.*

122. Christopher O'Leary, *Picking Enron's Bones Clean: Could Upcoming Bankruptcy Auction Shake Up Proposed Purchases?*, INVESTMENT DEALERS DIGEST, Oct. 27, 2003, available at 2003 WL 7572518 (noting that Portland General Electric Corp., owned by Enron, is seeking a

ownership will not provide the promised reliability, adequate customer service, and reduced prices.¹²³

2. *Using Eminent Domain to Take Control of Businesses for the Public Good.*—As far back as 1848, the Supreme Court in *West River Bridge Co. v. Dix*¹²⁴ allowed the government to use its eminent domain power to acquire an ongoing franchise to operate a toll bridge.¹²⁵ The toll bridge story began in 1795 when the Vermont state legislature granted to a private company the right to erect and operate a bridge.¹²⁶ However, in 1839 the legislature subjected this privilege to a town's eminent domain power and the franchise was terminated by the payment of compensation when the toll-bridge was converted to a free public highway.¹²⁷ The Court held that not only did the exercise of power not impair the obligation of contract in violation of the United States Constitution,¹²⁸ but also that the franchise grant to operate the toll bridge was property subject to condemnation.¹²⁹

One hundred years later in *Kimball Laundry Co. v. United States*,¹³⁰ the Court again allowed the use of eminent domain, this time by the United States, to temporarily condemn a private laundry plant to be used by the Army.¹³¹ As early as 1928, a *California Law Review* article discussed California's acquisition of

buyer and that "its biggest fear is that it might wind up being state property").

123. See, e.g., Saskal, *supra* note 2, at 1 (Portland General Electric's public relations materials opposing a public utility district state that "[n]ot only would the reliability of your electrical service be in doubt, your prices are likely to go up"); James Vaznis, *Rebuffed, City Seeks To Seize Waterworks*, BOSTON GLOBE, Mar. 30, 2003, at 6 (quoting Pennichuck's president and CEO as saying "I do not believe that the city or any political entity will be able to provide the level of customer service or meet the extensive capital and operational needs of such a system as successfully as Pennichuck has done over the decades"); see also Dennison, *supra* note 118, at 5A (discussing Great Falls' attempt to create a city-owned electric utility and NorthWestern's response that it "has no plans to sell any of its electric distribution system in Great Falls and would resist any attempt by the city to obtain it through condemnation").

124. 47 U.S. 507 (1848).

125. *Id.* at 536.

126. *Id.* at 530.

127. *Id.* at 530-31.

128. *Id.* at 532-33.

It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity.

Id. at 531.

129. *Id.* at 534 ("We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property.").

130. 338 U.S. 1 (1949).

131. *Id.* at 16.

public utility property by municipal eminent domain power.¹³² Specifically, the article addressed the issue of whether such a condemnation would be valid if the private utility also served citizens of a neighboring municipality who would be adversely impacted by the action.¹³³

A municipality's condemnation of a privately-owned power plant in order to achieve public ownership is a valid public use.¹³⁴ Utilities subject to such condemnation have received just compensation, including "going concern" value."¹³⁵ In *City of Omaha v. Omaha Water Co.*, the Court recognized that under Nebraska's charter of 1897, the city "was given, among other things, 'power to appropriate any waterworks system, plant, or property already constructed, to supply the city and the inhabitants thereof with water.'"¹³⁶ Over the water company's objections, the City of Omaha acquired municipal ownership of the water supply system as required by the Nebraska legislature in 1903.¹³⁷

Similarly, in 1963, the City of North Sacramento acquired a private water system using its eminent domain power under the California Public Utilities Code.¹³⁸ In *Citizens Utilities Co. of California v. Superior Court of Santa Cruz County*,¹³⁹ the California Supreme Court supported eminent domain action against utilities by holding that a privately-owned utility company may be compensated for involuntary and compulsory improvements made before an

132. Thomas H. Breeze, *Limitations on the Right of a Municipality in California to Condemn a Public Utility*, 16 CAL. L. REV. 105 (1928).

133. *Id.* at 107-10.

134. 2A SACKMAN, *supra* note 1, § 7.06[40], at 188 (citing *Pub. Serv. Co. of Colo. v. City of Loveland*, 245 P. 493 (Colo. 1926)).

135. *City of Denver v. Denver Union Water Co.*, 246 U.S. 178, 184 (1918) (discussing valuation of a water company and noting that allowance for "going concern" value was based "upon the ground that the company had 'an assembled and established plant doing business and earning money'"). See also *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 202-03 (1910) (stating that "[t]he difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers"); *Pac. Gas & Elec. Co. v. Devlin*, 203 P. 1058, 1059, 1063-64 (Cal. 1922) (reviewing the compensation to be paid to Pacific Gas and Electric Company by the city of Auburn for acquiring a water plant owned and operated by the private company); *Marin Mun. Water Dist. v. Marin Water & Power Co.*, 173 P. 469, 469 (Cal. 1918) (reviewing proceeding by which municipally-owned water company acquired property already devoted to a public use by private company). See also 2 SACKMAN, *supra* note 1, § 5.03[6][h] ("When a business is directly taken over by the public, such as when the plant of a public service corporation is acquired by a city or town and is set to be operated under municipal control, the plant is valued as a going concern and the good-will, so far as it adds value to the franchise and other property, is included in the award of compensation.").

136. 218 U.S. 180, 199 (1910) (quoting 1897 NEB. LAWS 27, ch. 10).

137. *Id.* at 193.

138. *City of N. Sacramento v. Citizens Util. Co.*, 32 Cal. Rptr. 308, 310 (Ct. App. 1963) (citing CAL. PUB. UTIL. CODE §§1401-1421).

139. 382 P.2d 356 (Cal. 1963).

eminent domain trial proceeding, but after the date of the condemnation action summons.¹⁴⁰

The state of New York, in a 1986 condemnation statute, legislatively encouraged the conversion of privately-owned power companies to public control to promote the economic well-being of the Long Island area by reducing power rates.¹⁴¹ In Oregon, the Oregon Supreme Court in *Emerald People's Utility District v. Pacific Power & Light Co.*,¹⁴² limited a "people's utility district's" (PUD's) right to obtain special pricing benefits by determining it did not qualify under the legislation as a municipality or state.¹⁴³ However, it did uphold the public entity's right to acquire through eminent domain a privately-held hydroelectric facility, already producing energy for the public.¹⁴⁴

Some states have balked at municipal attempts to acquire utilities.¹⁴⁵ The Utah Supreme Court, for example, upheld the dismissal of a condemnation action by a group of municipalities attempting to acquire an investor-owned power system.¹⁴⁶ The court held that under the Utah eminent domain statute, municipalities were allowed to condemn real property interests only and that "[t]he taking of an ongoing public utility business is more than the taking of real or even tangible personal property and is therefore, . . . not contemplated within" the state's eminent domain statute.¹⁴⁷ There is additional controversy over whether condemnation power can be used to acquire property already serving a public purpose.¹⁴⁸ Nevertheless, the preeminent eminent domain treatise clearly

140. *Id.* at 365.

141. 2A SACKMAN, *supra* note 1, § 7.06[40] (citing N.Y. PUB. AUTH. LAW § 1020-A).

142. 729 P.2d 552 (Or. 1986).

143. *Id.* at 557 (upholding lower court's determination that "a PUD is not a 'municipality' under ORS 543.610 and thus could not receive the benefit of the pricing scheme of ORS 543.610").

144. *Id.* at 556-57.

145. *See, e.g., City of Pryor Creek v. Pub. Serv. Co. of Okla.*, 536 P.2d 343, 346 (Okla. 1975) (finding eminent domain power not broad enough to allow municipal condemnation of a utility already dedicated to public use); *Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799, 805 (Tex. Comm'n App. 1936) (holding that legislature did not intend to allow city to condemn an existing utility company).

146. *See Kevin G. Glade, CP National Corp. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Power Systems*, 1982 UTAH L. REV. 913 (1982) (analyzing *CP Nat'l Corp. v. Pub. Serv. Comm'n*, 638 P.2d 519 (Utah 1981)).

147. *CP Nat'l Corp.*, 638 P.2d at 523 (citing the Interlocal Co-Operation Act, UTAH CODE ANN. § 78-34-1(3) (1953)).

148. *See, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 332 (1958) (citing a state court holding that "though the State Legislature has given the City the right to construct and operate facilities for the production and distribution of electric power and a general power of condemnation for those purposes, 'the legislature has (not) expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use'" (quoting *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 577 (Wash. 1957)). *But see Emerald People's Util. Dist. v. Pac. Power & Light Co.*, 729 P.2d 552, 556 (Or. 1986) (disagreeing with lower court's holding that public utility districts did not have "authority to condemn a private utility's

states that so long as this condemnation power is expressly stated to apply to existing public uses, it may be used with respect to a property already dedicated to a public use.¹⁴⁹

Precedent for the use of eminent domain power to acquire a going concern is not limited to situations involving privately-owned public utilities.¹⁵⁰ “[I]nto the Nineteenth Century, because of local droughts, the importance of a specific local industry, or other needs, courts gave legislatures wide discretion to use eminent domain to promote a wide variety of economic projects that would stimulate commerce and the general welfare.”¹⁵¹ More recently, one of the most notable cases where eminent domain was used to acquire an ongoing enterprise involved the move of the Raiders football team from Oakland, California, to Los Angeles in the early 1980s.¹⁵² In response to the City of Oakland’s attempted acquisition of the team to keep the franchise from moving to Los Angeles,¹⁵³ the California Supreme Court concluded that acquiring and operating a sports franchise could be an “appropriate municipal function.”¹⁵⁴ Therefore, the City would have the authority under California’s eminent domain statutes to acquire

hydroelectric facility already devoted to public use”).

149. 1A SACKMAN, *supra* note 1, § 2.2.

150. For other eminent domain decisions involving public utilities see for example: *City of Stilwell v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038, 1046 (10th Cir. 1996) (deciding the municipality’s attempt to use eminent domain to obtain a rural electric co-op is not preempted by the federal legislation, the Rural Electrification Act); *City of Morgan City v. South Louisiana Electric Cooperative Ass’n*, 31 F.3d 319, 324 (5th Cir. 1994) (holding “that the proposed state-law condemnation would frustrate the purpose” of the REA and therefore the municipalities’ condemnation action is “preempted under the Supremacy Clause”); *City of Madison v. Bear Creek Water Ass’n*, 816 F.2d 1057, 1060-61 (5th Cir. 1987) (rejecting the municipality’s condemnation of the water association financed by federal Farmers Home Administration (FmHA) loans as proscribed by congressional mandate forbidding such encroachment by local governments while an entity is indebted to FmHA); *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601, 603 (9th Cir. 1980) (holding that the “[s]tate municipal public utility [can]not condemn property owned by a federally subsidized public utility where the condemnation would interfere with the federal purpose of the Rural Electrification Act”); *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 202 (9th Cir. 1969) (finding the state’s use of eminent domain frustrated the purpose of the federal Rural Electrification Act by stating the “state law so written that a state-favored utility can by its unilateral action interfere with the federal purpose cannot stand under the supremacy clause of the constitution of the United States”).

151. 2A SACKMAN, *supra* note 1, § 7.07[3].

152. *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982); *see also* David Kravets, *Raiders Lead League in Lawsuits*, DAILY NEWS (Los Angeles), Apr. 24, 2003, at 7 (noting that “[t]he Oakland Raiders led the NFL in offense last year and are No.1 in the league in litigation”).

153. Kravets, *supra* note 152, at 7 (The team agreed to move back to Oakland in 1995 “after its Los Angeles Memorial Coliseum Commission contract expired and after several scuttled deals to move elsewhere.”)

154. *Oakland Raiders*, 646 P.2d at 843.

“any property necessary to accomplish that use.”¹⁵⁵ The Court noted that although “some statutes do explicitly prohibit the acquisition of an ongoing enterprise, there is no provision in present law which would preclude the taking contemplated by [sic] City.”¹⁵⁶

In addition to the well-reported¹⁵⁷ but unsuccessful¹⁵⁸ attempt by the City of Oakland to use eminent domain to keep the Raiders in Oakland, other cities have tried to keep sports franchises from relocating by using eminent domain or other tactics.¹⁵⁹ In *Mayor of Baltimore v. Baltimore Football Club, Inc.*,¹⁶⁰ the court recognized the Baltimore Colts NFL franchise as “intangible property [that] is properly the subject of condemnation proceedings.”¹⁶¹ However, deciding the case based on a jurisdictional issue, the court held that under Maryland law, Baltimore City did not have the power to condemn the team once the Colts had left the state.¹⁶²

Various government entities have attempted to use the eminent domain power for other public goals such as providing public housing¹⁶³ or preventing

155. *Id.*

156. *Id.*

157. Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocation*, 96 YALE L.J. 1343, 1345 (1987) (discussing local authorities' use of eminent domain, including the City of Oakland, to condemn businesses contemplating a relocation); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 62 (1986) (noting that the Oakland Raiders case “sustained an even more unconventional exercise of eminent domain”); Charles Gray, Comment, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329 (1986); Katherine C. Leone, Note, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 506 (1997) (discussing Oakland's use of eminent domain to take title to the football team); Ellen Z. Mufson, Note, *Jurisdictional Limitations on Intangible Property In Eminent Domain: Focus on the Indianapolis Colts*, 60 IND. L.J. 389, 393 (1985) (reporting that in the Oakland Raiders case “the California Supreme Court did determine that, subject to requirements of public use, a sports franchise, as intangible property, is condemnable”) (internal citation omitted); Lisa J. Tobin-Rubio, Casenote, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185 (1987).

158. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 158 (Ct. App. 1985) (holding that “burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise”).

159. See, e.g., *Mayor of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 289 (D. Md. 1986) (holding city was unable to condemn professional football franchise). See also Gray, *supra* note 157; Leone, *supra* note 157.

160. 624 F. Supp. 278 (D. Md. 1985).

161. *Id.* at 282.

162. *Id.* at 287 (resolving the dispute in favor of the football franchise as to the timing of the condemnation action and the location of the intangible property outside Maryland's jurisdiction at the time the power was exercised by the city).

163. 2A SACKMAN, *supra* note 1, § 7.06[25] (explaining that eminent domain may be used to provide housing to eliminate slums, provide low-rent or senior citizen housing, emergency housing for war or veterans, and that in some cases “[c]ourts have even upheld the power of the United

local industrial plants from closing or relocating.¹⁶⁴ Legal commentators have proposed that eminent domain be used to purchase “avigation easements” over land surrounding airports in order to resolve the issue of noise sensitivity when residential developments are located within the “noise footprint” of a local airport.¹⁶⁵ It has even been suggested that eminent domain power be used for acquiring cultural property from private owners to be returned to another nation making a claim for cultural repatriation.¹⁶⁶

Finally, with the potential for terrorism and biochemical warfare in this country, municipalities may need to consider using eminent domain to acquire government ownership of sensitive uses such as the water or power supply. The United States federal government enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 to protect the public from potential terrorism.¹⁶⁷ Among other requirements, this legislation requires water districts to assess the vulnerability of water treatment systems and reservoirs to terrorist activity.¹⁶⁸ In response to this act, some local water districts have taken serious steps to protect public water supplies from access by spending millions of dollars on fencing and security systems.¹⁶⁹

States to take the title of existing mortgages . . . so long as there is statutory authorization and just compensation is paid”).

164. See 2A *id.* § 7.06[29] (discussing “Prevention of Plant Facility Closings or Relocations”); 8A PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN, § 22.02 (3d ed. 2004) (“Expansion of the ‘Public Use’ Doctrine in Eminent Domain to Prevent Plant Closings or Relocations”); see also Michael H. Abbey, Note, *State Plant Closing Legislation: A Modern Justification For the Use of the Dormant Commerce Clause As a Bulwark of National Free Trade*, 75 VA. L. REV. 845 (1989); Lazarus, *supra* note 157; Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 138-39 (1995) (noting that if a company refuses to repay subsidies granted by the city as an incentive to prevent relocation, “it could be subject to takeover proceedings using the theory of eminent domain”); Schultz & Jann, *supra* note 6, at 387-410.

165. See Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1, 41-42 (2002) (citing J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource*, 22 TRANSP. L.J. 251, 266 (1994)); Scott Hamilton, *Planning for Noise Compatibility*, in AIRPORT REGULATION, LAW, & PUBLIC POLICY 85, 85-86 (Richard M. Hardaway ed., 1991); Luis G. Zambrano, Comment, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 469 (2000)).

166. Sean R. Odendahl, Note, *Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership*, 2001 U. ILL. L. REV. 475, 498 (2001) (suggesting that “the U.S. or state government can exercise its power of eminent domain and seize the cultural patrimony” to return an artifact to another nation based on a valid claim for repatriation).

167. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

168. 42 U.S.C. § 300i-2 (Supp. I 2002).

169. See, e.g., Northern Kentucky Citizens for Open Reservoirs, *Save the Reservoir: Petition of Northern Kentucky Citizens for Open Reservoirs to the Northern Kentucky Water Service District* (n.d.) (requesting that “means other than fencing and restrictions to access” be used to

Although these extreme actions may not be warranted,¹⁷⁰ municipalities might justifiably be concerned about the security of privatized utility companies, which may be foreign-owned. Municipalities at some point may be compelled to use their eminent domain power to acquire key public utilities, such as a privately-held water company, if the utility is owned by a foreign company based in a country unfriendly to the United States. As the trend toward more international business connections develops, utilities such as electricity or water may be considered a national security concern requiring national policy guidance not only for assessment of risk,¹⁷¹ but for control of ownership.¹⁷²

If the above scenarios make sense as valid uses of government power, why then could not a state university system use its eminent domain power to acquire a privately-owned university if doing so would increase the educational opportunities available to its residents?¹⁷³ Or why not allow the state to use its eminent domain power to acquire a car manufacturer to produce electric cars to assist the state in meeting its emission standards? Clearly, unless we are willing to unleash government power to control private enterprise for the public good, there must be conscious limits placed on the eminent domain power to prevent such overreaching. Although limiting the definition of what constitutes a public use may serve to restrain some government action, this is not a sufficient restraint since many of the above uses, such as supplying water, electricity, housing, or education, are unquestionably in the public good. Part II addresses several theories under which the government's power to acquire private enterprise for the public good can be restrained.

provide security in order to balance the "needs of the citizens to have access to an aesthetically pleasing green space and to preserve the quality of life and the property values in that part of the community, and the community as a whole") (on file with author).

170. See, e.g., Brock N. Meeks, *U.S. Water Supply Vulnerable: Risks Were Known, But Ignored, Before Sept. 11* (Jan. 14, 2002), MSNBC, at <http://www.msnbc.msn.com/id/3340643> ("Experts agree that introducing a toxin into the raw water reservoir would have little impact owing to the dilution effect several million gallons of water would have on any biohazard.").

171. See Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

172. Botchway, *supra* note 87, at 826 (noting that "[a]n increasing emphasis on the international dimensions of the business is one of the new characteristics of the electricity industry").

173. This thought could not help but cross my mind as I sat in a recent Land Use Conference at Chapman School of Law and listened to Professor Tony Arnold joke about how his alma mater, Stanford, was referred to by one out-of-town visitor as the "University of California at Stanford." However, the idea did not seem quite so far-fetched when my research revealed that California Education Code section 92040 provides that "[t]he Regents of the University of California may acquire by eminent domain any property necessary to carry out any of the powers or functions of the University of California." CAL. EDUC. CODE § 92040 (West 2002).

II. THE EMINENT DOMAIN POWER & ITS CONSTRAINTS

The eminent domain power in the United States has its roots in English law and although we are not sure of its precise origins, some argue that the concept dates back to the Romans.¹⁷⁴ The Fifth Amendment to the United States Constitution makes this power available to the federal government and to the states through the Fourteenth Amendment and in turn “as an inherent attribute of sovereignty, subject to limitations found in each state’s constitution or statutory law.”¹⁷⁵ According to Richard Epstein, this power demonstrates the “social limitations upon the private rights of ownership. . . . [by authorizing] at the constitutional level the forced exchanges found in the laws of necessity and nuisance.”¹⁷⁶ However, if the sovereign controls these social limitations, the exercise of this power must be restrained by some public purpose requirement that finds its sources in either societal necessity or nuisance control.¹⁷⁷ Part II of this Article examines the various ways by which the government’s eminent domain power is currently constrained or can be controlled in the future.

A. *The Fifth Amendment*

The Fifth Amendment of the U.S. Constitution provides in part, “nor shall private property be taken for public use, without just compensation.”¹⁷⁸ Although it is one of the most important constitutional protections of property rights, some feel that the protection of the Fifth Amendment has been greatly weakened by a “relaxed public use standard.”¹⁷⁹ One of the major constraints on the eminent domain power is that the government may only use its power to condemn

174. Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1249 (2002).

175. 2A SACKMAN, *supra* note 1, § 7.01[1] (internal citation omitted).

176. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN ix (1985). See also Timothy Sandefur, *A Natural Rights Perspective On Eminent Domain In California: A Rationale For Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 584-85 (2003) (explaining that a natural rights view considers eminent domain to be “a collective state of necessity” as compared to “the case of an individual emergency” which would be called “a private necessity”).

177. See Harrington, *supra* note 174, at 1252 (explaining that “courts and commentators have attempted to counter the obvious harshness” of allowing the sovereign’s superior right to a citizen’s property by “imposing a ‘public purpose’ limitation on the use of eminent domain”); see also *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting) (“The power of eminent domain claimed by the City in this case is not only novel but virtually without limit.”).

178. U.S. CONST. amend. V.

179. Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 51-52 (1998) (observing that “the beneficiaries of a relaxed public use standard are often powerful and wealthy special interests capable of convincing the state to use its power to displace residents from their homes and businesses”).

property that will be used to further a public purpose.¹⁸⁰ However, even with the “public purpose” limitation on the eminent domain power under the Fifth Amendment,¹⁸¹ the government in its judicial or legislative capacity determines what constitutes a public purpose and has interpreted this requirement quite broadly¹⁸² to be “coterminous with the scope of a sovereign’s police powers.”¹⁸³

The initial determination of what constitutes a public purpose is a legislative decision. However, the courts have the final authority to decide the extent of control over private property based on whether the legislative determination of public use is permitted. This final authority is exercised with great deference to the legislature, resulting in extensive legislative power to condemn private property for various purposes.¹⁸⁴ Consistent with the U.S. Supreme Court’s broad interpretation of what constitutes a public use in *Berman v. Parker*¹⁸⁵ and *Hawaii Housing Authority v. Midkiff*,¹⁸⁶ recent state court decisions have allowed the use of eminent domain “to support many types of urban renewal activities, including acquisition of private businesses . . . as valid public uses.”¹⁸⁷ Generally, the courts will not interfere with the government’s determination of public use and “the Fifth Amendment’s public use clause provides little or no protection to property owners.”¹⁸⁸

Many have expressed concern that this broad interpretation of public use allows the government to abuse its power to take property without an owner’s

180. Harrington, *supra* note 174, at 1255 (quoting Senator Tracy’s concurring opinion in *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 56-62 (N.Y. 1837) that “the use of the phrase ‘public use’ in the Fifth Amendment was ‘designed to be as well a limitation as a definition of the right of the [federal government] as sovereign . . . to interfere with the otherwise absolute right of the citizen to the undisturbed possession and enjoyment of his own property’”). *But see id.* at 1300 (concluding that “the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not”).

181. *See id.* at 1252 (noting that “the so-called ‘public use’ requirement is really a rather late innovation in the law of eminent domain and is found mainly in nineteenth and twentieth century American cases”).

182. *See, e.g.,* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

183. 2A SACKMAN, *supra* note 1, § 7.01[1] (quoting *Hawaii Hous. Auth.*, 467 U.S. at 240).

184. 2A *id.* § 7.03[11][b]; *see also* Kochan, *supra* note 179, at 52 (expressing concern that special interest groups will not be constrained by constitutional doctrine because “[t]he judiciary has failed to take a guardianship role in relation to the Public Use Clause [and] [a] public use is now whatever the legislature says is public”); Merrill, *supra* note 157, at 63 (observing that “cases suggest that modern courts are exceedingly deferential to legislative definitions of a permissible public use”); Mufson, *supra* note 157, at 389 (noting that “[t]he Supreme Court has effectively eliminated public use as a check against condemnation by directing the judiciary to defer to the legislature on this issue”).

185. 348 U.S. 26 (1954).

186. 467 U.S. 229 (1984).

187. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c].

188. Sandefur, *supra* note 176, at 595.

consent and may “benefit the politically powerful at the expense of the underprivileged.”¹⁸⁹ However, the eminent domain acquisition of privately-owned utilities for purposes of municipalization can easily be considered a valid public use, even without this broad interpretation.¹⁹⁰ Condemning private property to benefit other private interests, such as with urban redevelopment, requires broad interpretation, while condemning private property so that the government may take it over and operate it keeps the property in the hands of the government for public use. Thus, restricting the public use definition would seemingly not have much impact on how eminent domain power may be used to acquire privately-owned utilities or businesses to convert them to municipal ownership and operation. Even if the government’s power to use eminent domain to transfer condemned property to private developers is restricted, some argue that local governments might decide to own the shopping or office centers rather than turn the condemned property over to private developers.¹⁹¹

Instead of using the public use definition to fight condemnation actions, property owners must look to other constitutional limitations to curb the government’s eminent domain power. Within the Fifth Amendment itself, the definition of property can operate as a restraint on government power, depending upon the jurisdictional approach.¹⁹² Although some state statutory provisions require that the property subject to eminent domain be real property,¹⁹³ many states interpret property broadly to include all types of both real and personal interests.¹⁹⁴ Eminent domain power may also be limited by requiring the government to show necessity, either based upon a statutory requirement or by court interpretation of what constitutes a valid public use.¹⁹⁵ Finally, some

189. *Id.* at 675.

190. *See* *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) (“Public utility facilities such as power plants [and] water treatment facilities also have the traditional public use character, as does the construction of government buildings.”).

191. *See* Sam Staley, *Wrecking Property Rights*, REASON, Feb. 1, 2003, at 32 (citing Jeff Finkle, president of the International Economic Development Council).

192. *See infra* Part II.B.3 (discussion of state issues).

193. *See infra* Part II.B.5 (discussing the definition of property); *see, e.g.*, IND. CODE ANN. § 32-24-4-1(a) (West 2002) (authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added); S.C. CODE ANN. § 28-2-60 (Law Co-op 2002) (eminent domain power appears to be limited to real property based on statutory language that “condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose”).

194. *See, e.g.*, CAL. CIV. PROC. CODE § 1235.170 (West 2003) (stating “‘property’ includes real and personal property and any interest therein”); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (stating “we conclude that our eminent domain law authorizes the taking of intangible property”).

195. *See infra* Part II.B.4 (discussing necessity); *see, e.g.*, *Stearns v. City of Barre*, 50 A. 1086, 1092 (Vt. 1901) (“The sovereign remains the judge of the necessity, but ultimately determines it through the judicial branch of its government, instead of the legislative branch.”); *Oakland Raiders*, 646 P.2d at 846 (Bird, C.J., concurring and dissenting).

jurisdictions limit the government's condemnation authority where a privately-held property interest is already being devoted to a public purpose, such as is the case with many public utility functions.¹⁹⁶

B. State Statutory and Constitutional Limitations

The eminent domain power is available to the federal government through the Fifth Amendment and to the states "as an inherent attribute of sovereignty, subject to limitations found in each state's constitution or statutory law."¹⁹⁷ Since the eminent domain power may be defined in either statutory or constitutional provisions, or both, these sources should be explored before state or municipal power is exercised to condemn privately-owned enterprises. "To establish that a state or municipality's eminent domain power may be used" for the proposed purpose, it must first be established that the "particular state's constitutional or statutory eminent domain provisions . . . permit broad legislative discretion within which eminent domain may be employed for a wide variety of 'public uses.'"¹⁹⁸ However, some "jurisdictions have interpreted their eminent domain authority as an inherent attribute of (state) sovereignty, subject only to constitutional limitation, and thus not requiring constitutional specification."¹⁹⁹

196. See *infra* Part II.B.6 (discussing the prior public use doctrine); see, e.g., NEV. REV. STAT. § 37.040(3) (2003) (before a judgment of condemnation is entered in Nevada, the court must first find that "[i]f the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use").

197. 2A SACKMAN, *supra* note 1, § 7.01[1] (internal citation omitted).

198. 8A ROHAN & RESKIN, *supra* note 164, § 22.01[1] (acknowledging that the use of eminent domain to prevent plant closings or the relocation of an existing sports franchise is a valid public use).

199. 8A *id.* § 22.02[3][c]; see also *Gohld Realty Co. v. Hartford*, 104 A.2d 365, 368 (Conn. 1954) ("It is fundamental that, as an attribute of sovereignty, the state government or any properly designated agency thereof may take private property under its power of eminent domain if the taking is for a public use and if just compensation is paid therefor[sic]."); *Dep't of Pub. Works & Bldgs. v. Kirkendall*, 112 N.E.2d 611, 613 (Ill. 1953) ("The power and right of eminent domain is inherent in the sovereign State, existing independently of written constitutions or statutory laws thereof, regulated by appropriate legislation, limited only by the constitutional provision for compensation, and extending to every kind of property.") (citing *South Park Comm'rs v. Montgomery Ward & Co.*, 93 N.E. 910 (Ill. 1911); *Litchfield & Madison Ry. Co. v. Alton & So. R.R. Co.*, 137 N.E. 248 (Ill. 1922)); *Riden v. Philadelphia, B. & W.R.R.*, 35 A.2d 99, 100 (Md. 1943) ("It is a fundamental principle of constitutional law that the power of eminent domain is a prerogative of sovereignty and does not require the sanction of the Constitution for its existence in the State.") (citing *Moale v. City of Balt.*, 5 Md. 314 (Ct. App. 1854); *United States v. Jones*, 109 U.S. 513 (1883); 29 C.J.S., *Eminent Domain*, § 2); *Town of Morganton v. Hutton & Bourbonnais Co.*, 112 S.E.2d 111, 113 (N.C. 1960) ("The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty. Our Constitution, art. I, sec. 17, requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking."). But see *Harwell v. Ga. Power Co.*, 267 S.E.2d 769, 774 (Ga.

Therefore, eminent domain power can be used to acquire a private business for a public use unless such a use has been expressly precluded.²⁰⁰ The remainder of this section will examine state and municipal constitutional and statutory authority to acquire an ongoing business enterprise by condemnation.

1. *Delegation of Power.*—As is done with state police power to regulate for the health, safety, welfare, and morals of its citizens, a state may delegate its eminent domain power to local governmental entities. This delegation is accomplished through express legislation granting power to municipalities and public services corporations, such as privately-owned utility companies which provide services or products to the community.²⁰¹ For example, legislation in Delaware declares that municipal operation of electric utility systems is in the public interest and that such municipal ownership will promote the welfare of state residents.²⁰²

In addition to allowing government condemnation, state statutory provisions may authorize property condemnation by a privately-owned public utility to serve “a specific provable public need,”²⁰³ such as erecting an electric power line to supply electricity to a community.²⁰⁴ A prime example of delegating this authority to a public service corporation is the eminent domain power given to the railroads. Eminent domain power was delegated to allow the corporate railroads to obtain rail beds for the establishment of a railroad.²⁰⁵ Thus private companies may possess eminent domain power through legislative delegation to condemn private property for a use that benefits the public.

State constitutions may also specifically authorize delegation of the eminent domain power. In some states, the state constitution will “authorize the taking of property for purposes not ordinarily considered public.”²⁰⁶ For example, Michigan’s constitution provides that “[t]he Regents of the University of

Ct. App. 1980), *aff’d*, 269 S.E.2d 464 (Ga. 1984) (“The power of eminent domain is inherent in the sovereign state, but lies dormant until granted by act of the legislature.”).

200. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3]. See also *Hendershott v. Rogers*, 211 N.W. 905, 905 (Mich. 1927) (“The power of eminent domain is inherent in sovereignty. It is in the state without recognition in the Constitution, but its exercise is subject to any restrictions or limitations found therein.”) (citing *Loomis v. Hartz*, 131 N.W. 85 (Mich. 1911)).

201. 2A SACKMAN, *supra* note 1, § 7.01[1].

202. DEL. CODE ANN. tit. 22, § 1301 (2002).

203. 2A SACKMAN, *supra* note 1, § 7.04[1][b] (discussing the parameters for condemnation by a public service corporation).

204. 2A *id.* § 7.05[4][a]. See, e.g., MICH. COMP. LAWS § 486.254 (West 2002) (Michigan gives corporations involved in the gas and electric business as a public utility “the right to condemn private property”); WIS. STAT. § 66.0825(6) (2002) (“The general powers of an electric company include the power to . . . [e]xercise the powers of eminent domain granted to public utility corporations under ch. 32.”).

205. 2A SACKMAN, *supra* note 1, § 7.05[3].

206. 2A *id.* § 7.03[10][c] (listing several state constitutional provisions specifically authorizing condemnation for things such as diverting “the unappropriated water of any natural stream to beneficial uses”).

Michigan shall have the power to take private property for the use of the university, in the manner prescribed by law.”²⁰⁷ Although this provision was probably intended to allow the university to acquire real property for campus development, an attempt by the Regents to condemn an ongoing private enterprise—for example, a privately-owned campus food service operation—might test the extent of this power.²⁰⁸

The state legislature may determine that the eminent domain power should be used to acquire an ongoing business in order to serve the public good. Explicit statutory authorization for use of such power encourages and facilitates the condemnation process. For example, in the Baltimore Colts case mentioned above,²⁰⁹ the Maryland state legislature enacted an emergency bill to authorize Baltimore City to condemn the Colts, a professional football franchise, to keep it from relocating.²¹⁰ Although this legislation authorized the city to use eminent domain over a sports franchise, Baltimore’s attempt to exercise this power was procedurally defeated. A federal court determined that Baltimore did not have the jurisdiction to use this power since the franchise relocated outside the city limits prior to the city’s filing of the condemnation action.²¹¹

2. *Home Rule Cities*.—The home rule concept was created to recognize local government autonomy and came into being in 1875 when St. Louis, Missouri, became the first city to receive home rule power based on an amendment to the Missouri Constitution.²¹² This amendment allowed the city to establish its own government document or charter and define its own powers.²¹³ Professor David Barron, in discussing the historical background of the different approaches to home rule and municipal reform, points out that “[s]ocial home rulers also sought to implement a program of municipalization to free cities from their long dependence upon private businessmen for services” such as the provision of gas and electricity and even streetcars, bathhouses, and newspapers.²¹⁴ This particular view of home rule argued for giving cities local control over taxing rather than limiting their tax authority in order to allow them to finance projects such as municipal utilities.²¹⁵

Professor Barron explained that the social city home rulers “advanced their general view that the city was a vanguard site for social interdependence in

207. 2A *id.* § 7.03[10][c](quoting MICH. CONST. art. XIII, § 4).

208. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c] (“Unless explicitly expressed, state eminent [sic] authority does not preclude the acquisition of a private business, even in cases to prevent their closing or relocation.”) (internal citation omitted).

209. *See supra* notes 157-60 and accompanying text.

210. *Mayor of Balt. v. Balt. Football Club Inc.*, 624 F. Supp. 278, 280-81 (D. Md. 1986) (noting that the condemnation power was also authorized by an emergency ordinance enacted by the Mayor and City Council of Baltimore).

211. *Id.* at 284.

212. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2289-90 (2003).

213. *Id.* at 2290.

214. *Id.* at 2315-16.

215. *Id.* at 2313.

support of the quite specific view that cities should have the right to pursue municipal ownership.”²¹⁶ This view encouraged states to allow an expanded local condemnation power in order to enable cities to achieve city planning through actual purchase of privately-held land, not just by exercise of zoning power.²¹⁷ Observing that “[n]o single home rule vision won a clear victory”²¹⁸ in the historical development of the home rule concept, Professor Barron recognizes that these visions are traceable in some form in our modern local government model.²¹⁹

Today, under a majority of state constitutional schemes, home rule cities are traditionally given the power to legislate matters of local concern without the need for specific state legislative authority or delegation.²²⁰ So long as the home rule city is legislating a local concern, any conflicting state statute will be superseded by the home rule provision.²²¹ Determining what constitutes a “local concern,” however, may be troublesome when a municipalization effort affects surrounding communities or even a state or federal interest such as a power distribution system within an electrical grid.²²² Home rule cities, not otherwise constrained by state legislative power, may be thwarted in their efforts to municipalize through condemnation by a strict construction of the phrase “local concern.” Home rule also provides that when a municipality is dealing with a mixed local and state concern, any conflict between a state and local provision will be resolved in favor of the state.²²³

A home rule city’s attempt to municipalize an ongoing enterprise through eminent domain will be restrained by state legislation if the targeted enterprise is determined to involve a matter of mixed local and state concern²²⁴ or if it is not sufficiently “local” in nature, based on a strict construction of what constitutes a “local” concern. Thus, if a state wishes to limit the local authority of home rule cities to municipalize, this may be achieved judicially through the interpretation of what constitutes a “local” concern. Otherwise, a state constitutional amendment will be required to override local authority to prevent local condemnation actions authorized under a home rule grant. Such a constitutional amendment might also be necessary if a state wishes to promote municipalization

216. *Id.* at 2317 (citing Delos F. Wilcox, *Fundamental Planks in a Public Utility Program*, 57 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 18 (1915)).

217. *Id.* at 2318-19.

218. *Id.* at 2322.

219. *Id.*

220. DANIEL R. MANDELKER, *LAND USE LAW* § 4.24 (5th ed. 2003).

221. *See, e.g.*, *U.S. WEST Communications, Inc. v. City of Longmont*, 948 P.2d 509, 515 (Colo. 1997).

222. *See Barron, supra* note 212, at 2350-52 (discussing how urban sprawl may not be considered a purely “local” concern and thus home rule grants may actually be construed to limit local efforts to combat this sprawl).

223. *U.S. WEST Communications, Inc.*, 948 P.2d at 515.

224. *See id.* at 515-18 (discussing how to determine whether the issue regarding relocation of utility facilities was a matter of mixed local and state concern).

efforts through the use of eminent domain by home rule cities since conflicting state legislation would not override “local” concern authority by home rule cities.²²⁵

3. *Public Use*.—As in Fifth Amendment jurisprudence, the concept of public use for purposes of interpreting state eminent domain authority is very broad.²²⁶ Some jurisdictions attempt to list every possible public use for which the eminent domain can be exercised, while others use broad language similar to the Fifth Amendment. This broad language allows the courts significant discretion in deciding what constitutes a public use.

Although many states have a broad interpretation of public use, some states, such as Arizona, specifically identify the public uses subject to the condemnation, including canals, roads, wharves, bridges, telephone lines, aviation fields and petroleum pipe lines.²²⁷ An Arizona decision involving a city’s attempt to use its power to acquire property for a public cemetery expansion restricted municipal power to only those public uses expressly authorized by statute.²²⁸ The Arizona court held that because the public cemetery use was not specifically listed, the city did not have the power to use condemnation for the expansion.²²⁹ However, if the public use the city is attempting to municipalize is specifically listed, the Arizona Constitution grants municipalities “the right to engage in industrial pursuits”²³⁰ and courts interpreting this provision have held that it “confers on municipalities the right to engage in industry ‘without specifying any limitation whatever as to kind or character.’”²³¹ Given that there is a requirement that the public use to be condemned be specifically listed, Arizona municipalities and municipalities in other states using the same approach²³² will need to check statutory provisions

225. See Barron, *supra* note 212, at 2366-27 (suggesting that state constitutional grants of home rule be expanded to “include matters of greater-than-local concern” to facilitate interlocal efforts to reduce sprawl).

226. See 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c] (noting that “in numerous jurisdictions, the public use requirements for eminent domain have been interpreted in very broad terms”); see also *supra* Part II.A (discussing Fifth Amendment).

227. ARIZ. REV. STAT. § 12-1111 (2002) (discussing “[p]urposes for which eminent domain may be exercised”).

228. City of Mesa v. Smith Co. of Ariz., Inc., 816 P.2d 939, 940 (Ariz. Ct. App. 1991).

229. *Id.* at 941 (“We interpret the statutes narrowly because the power of eminent domain belongs to the state, and it is for the legislature to decide when that power should be delegated to another body.”).

230. See ARIZ. CONST. art. 2, § 34.

231. Hohokam Irrigation & Drainage Dist. v. Ariz. Pub. Serv. Co., 64 P.3d 836, 839 (Ariz. 2003) (quoting Crandall v. Town of Safford, 56 P.2d 660, 663 (Ariz. 1936) (allowing an irrigation district to sell electricity to customers outside district boundaries)).

232. See, e.g., N.C. GEN. STAT. § 40A-3 (2003) (listing specific public uses); Dep’t of Transp. v. Rowe, 549 S.E.2d 203, 211 (N.C. 2001) (referring to the eminent domain statute in stating “[e]ach section also lists with some specificity the types of public uses that these condemnors can undertake through the use of eminent domain”).

before attempting to municipalize a particular utility, even if the municipality has the constitutional authority to engage in such a pursuit once it has been acquired.²³³

Some jurisdictions may list uses that qualify as public, but these statutory declarations of public use are not necessarily exhaustive. For example, Washington state lists a myriad of public uses subject to condemnation,²³⁴ but a general grant of power authorizes eminent domain over a use not enumerated so long as a court determines that the use is a public one “of the same kind” as those specifically listed.²³⁵ In California, the statutory scheme was changed in 1975²³⁶ from one using a specific list of uses for which eminent domain could be applied to one with a general provision allowing a city to “acquire by eminent domain any property necessary to carry out any of its powers or functions.”²³⁷

Regardless of whether the allowed use is specifically stated or freely interpreted from a broad grant of sovereignty, jurisdictions vary as to who makes the final determination of public use.²³⁸ Arizona, in its constitution, specifically reserves this decision for the judiciary.²³⁹ Similarly, in the Washington Constitution, “the question whether the proposed acquisition is for such a use is a judicial question, although a legislative declaration will be accorded great weight.”²⁴⁰ However, in California, case law indicates that “decisions as to the proper scope of the power of eminent domain generally have been considered legislative, rather than judicial, in nature”²⁴¹ and thus the judiciary cannot act to constrain this power without legislative authority.²⁴² Case law in Connecticut and Hawaii also establishes that the legislature, not the judiciary, is responsible

233. See ARIZ. REV. STAT. § 12-1111(10) (2003) (listing the following public uses: “[e]lectric light and power transmission lines, pipe lines used for supplying gas, and all transportation, transmission and intercommunication facilities of public service agencies”).

234. WASH. REV. CODE § 8.12.030 (2002).

235. *In re City of Seattle*, 638 P.2d at 559 (“the general language of RCW 8.12.030—‘for any other public use’—is restricted to uses which are of the same kind as those enumerated in the section or which are specifically authorized by the legislature”).

236. See CAL. CIV. PROC. CODE § 1240.010 (Deering 2003) (stating, in the Law Revision Commission Comment, that the new language was intended “to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for public use”).

237. CAL. GOV’T CODE § 37350.5 (Deering 2003).

238. See *In re City of Seattle*, 638 P.2d at 556 (“Only the constitutions of Arizona, Colorado and Missouri have provisions similar to the Washington State Constitution. Like the Washington Constitution, the question whether the contemplated use be really a public use shall be a judicial question and determined as such without regard to any legislative assertion.”).

239. *Id.*

240. *Id.* at 555 (citing *Des Moines v. Hemenway*, 437 P.2d 171, 175 (Wash. 1968)).

241. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting).

242. *Id.*

for the determination of what constitutes public use.²⁴³ Therefore, states wishing to encourage municipalization may legislatively revise their statutory provisions to delegate this sovereign power, but the final decision as to whether an attempt to use the power in this way is a valid public use may be reserved for the judiciary.²⁴⁴

4. *Necessity*.—Another limitation on the government's eminent domain power is that it can only be used to acquire property that is necessary for the public good.²⁴⁵ Similar to the determination of what constitutes a public use, jurisdictions vary in approach as to whether the necessity determination is made by the legislature or the judiciary. In a few states, the judiciary determines whether or not the condemnation is necessary.²⁴⁶ In Alabama, for example, the court in *Southern Electric Generating Co. v. Leibacher*, held that the judge determines the right to condemn, not the jury, and stated “[w]hether or not the property is necessary or advisable, or whether more property is taken than necessary, and whether or not it is ever paid for or who pays for it, are not questions for the jury to consider nor to be brought before it in any way.”²⁴⁷ By statute, Nevada requires that before a condemnation of judgment is entered, the court must first find that “[t]he property is necessary to such public use.”²⁴⁸

Other states require judicial deference to the legislature's necessity

243. See, e.g., *Bugryn v. City of Bristol*, 774 A.2d 1042, 1049 (Conn. App. Ct. 2001) (quoting *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 371 (Conn. 1954)).

It is well settled that “[t]he determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred.”

Id. at 1049; *Small Landowners of Oahu v. City of Honolulu*, 832 F. Supp. 1404, 1408 (D. Haw. 1993) (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”).

244. See, e.g., ARIZ. CONST. art. 2, § 17 (The Arizona Constitution states that “the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”).

245. See, e.g., FLA. STAT. ch. 73.021 (2003) (“[W]hich petition shall set forth: (1) The authority under which and the use for which the property is to be acquired, and that the property is *necessary* for that use . . .”) (emphasis added); *Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 165 P. 1128, 1128 (Idaho 1916) (“If a reasonable, although not an absolute, necessity exists to take property for a public use, it is sufficient.”).

246. See, e.g., *S. Elec. Generating Co. v. Leibacher*, 110 So. 2d 308 (Ala. 1959); see also *Stearns v. City of Barre*, 50 A. 1086, 1092 (Vt. 1901) (“The sovereign remains the judge of the necessity, but ultimately determines it through the judicial branch of its government, instead of the legislative branch.”).

247. 110 So. 2d at 313.

248. NEV. REV. STAT. § 37.040(2) (2003).

determination. In California, "courts have traditionally refused to examine whether the taking of a particular piece of property is *necessary* for an asserted public purpose."²⁴⁹ The "[l]egislature has narrowly defined court review in this area"²⁵⁰ such that there is no judicial relief unless it can be shown that "the City's decision to use its power of eminent domain in this fashion was completely irrational."²⁵¹ When the determination of necessity is reviewed, the degree of necessity required for condemnation is generally considered to be "reasonable," not "absolute," necessity.²⁵² Several other jurisdictions limit judicial intervention or investigation into the determination of whether a government's exercise of eminent domain is necessary.²⁵³ Only when the condemning authority abuses its discretion or acts irrationally may the court review the necessity determination.²⁵⁴

249. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting).

250. *Id.*

251. *Id.*; see also Sandefur, *supra* note 176, at 669-70 ("The distinction between public use and public necessity remains viable in California law; courts defer in almost every case to a legislative finding of necessity, but will review to at least some extent whether the use is in fact public.").

252. See, e.g., *Mich. State Highway Comm'n v. Vanderkloot*, 204 N.W.2d 22, 25 (Mich. Ct. App. 1972), *aff'd*, 220 N.W. 2d 416 (Mich. 1974) ("The taking, however, need not be an absolute necessity; it is sufficient that it is reasonably necessary for public convenience or advantage."); *In re R.I. Suburban Ry. Co.*, 48 A. 591, 592 (R.I. 1901) ("We do not question that the term 'necessary,' as used in the statute, does not mean an absolute necessity, in the sense that the particular land is indispensable, but, rather, that the land, or other similarly situated, is reasonably required for a public purpose.").

253. See, e.g., *Miles v. Brown*, 156 S.E.2d 898, 900 (Ga. 1967) ("The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under the due process clause of the Fourteenth Amendment and the same clause of the Constitution of this state.") (quoting *Tift v. Atl. Coast Line R.R. Co.*, 131 S.E. 46, 52 (Ga. 1925)); *Indianapolis Power & Light Co. v. Barnard*, 371 N.E.2d 408, 411 (Ind. Ct. App. 1978) ("Significantly the courts are not to infringe upon the administrative act of determining the necessity or reasonableness of the decision to appropriate and take land. Rather they are only to determine whether there is legislatively delegated legal authority which would allow the exercise of the power of eminent domain to acquire the land.") (citing *Cemetery Co. v. Warren Sch. Twp.*, 139 N.E.2d 538 (Ind. 1957)); *Louisville & N. R. v. City of Louisville*, 114 S.W. 743, 747 (Ky. Ct. App. 1908) ("The necessity for the taking is a matter to be determined by the legislative department, state, or municipal, as the case may be, and the question whether it is taken for a public use is for the judiciary."); *City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950) ("The question of the existence of the necessity for exercising the right of eminent domain, where it is first shown that the use is public, is not open to judicial investigation and determination, but that the body having power to exercise the right of eminent domain is also invested with power to determine the existence of the necessity.").

254. See, e.g., *Emerald People's Util. Dist. v. Pacificorp*, 784 P.2d 1112, 1117 (Or. Ct. App. 1990) (involving a "judicial application of a state statute that requires the courts to determine whether a condemnor has abused its discretion through a taking that is not compatible with the

Even where this power is delegated to a private corporation, some jurisdictions provide that “the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the right.”²⁵⁵

5. *Property*.—Many states use the broad term “property” to identify what may be subject to eminent domain,²⁵⁶ but some jurisdictions use more specific terms such as “real property,”²⁵⁷ “land,”²⁵⁸ “real or personal property,”²⁵⁹ or even

greatest public good and least private injury”); *Town of Perry v. Thomas*, 22 P.2d 343, 345 (Utah 1933) (“Under powers thus delegated to municipal boards the necessity, expediency, or propriety of opening a public street or way is a political question, and in the absence of fraud, bad faith, or abuse of discretion the action of such board will not be disturbed by the courts.”).

255. *Zurn v. City of Chicago*, 59 N.E.2d 18, 25 (Ill. 1945) (“[W]hile the question whether the use for which the appropriation of property by eminent domain is sought is public in its nature is a judicial question which the court may determine, yet when it is determined that the proposed use is public the court cannot inquire into the necessity of [sic] propriety of exercising the right of eminent domain.”) (citing *Chicago, Milwaukee & St. Paul Ry. Co. v. Franzen*, 122 N.E. 492, 496 (Ill. 1919)). See also *City of Newport v. Newport Water Corp.*, 189 A. 843, 846 (R.I. 1937) (finding that legislative power can be delegated to a private corporation and stating that “[t]he necessity and expediency of the taking, as distinguished from the nature of the use to which the property taken is to be devoted, is purely a legislative question with which the courts have nothing to do. If it is admitted that the use for which the property is taken is public, there is nothing left for judicial determination.”); *Atkinson v. Carolina Power & Light Co.*, 121 S.E.2d 743, 746 (S.C. 1961) (“[T]he Legislature of South Carolina has expressly delegated to the defendant company, and all others similarly engaged, the power of eminent domain. In the exercise of that power those to whom it has been delegated represent the sovereignty of the state, and are empowered to decide, subject only to supervision of the courts to avoid fraudulent or capricious abuse, what and how much land of the citizens they will condemn for their purposes.”).

256. See, e.g., FLA. CONST. art. X, § 6(a) (“No *private property* shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”) (emphasis added); GA. CONST. art. I, § I, ¶ I (“No person shall be deprived of life, liberty, or property except by due process of law.”); ILL. CONST. art. 1, § 15 (“Private property shall not be taken or damaged for public use without just compensation as provided by law.”).

257. See, e.g., IND. CODE ANN. § 32-24-4-1(a) (West 2002) (stating authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added); S.C. CODE ANN. § 28-2-60 (Law. Co-op. 2002) (The eminent domain power appears to be limited to real property based on the statutory language that a “condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose.”).

258. See, e.g., IND. CODE ANN. § 32-24-4-1(a) (West 2002) (stating authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added).

259. See, e.g., GA. CODE ANN. § 46-3-126 (2003) (“The authority shall have all powers necessary or convenient . . . including, but without limiting the generality of the foregoing, the power: . . . (3) To acquire in its own name real property or rights and easements therein and

“rights of way,”²⁶⁰ “water gates,”²⁶¹ or “easements.”²⁶² The general term, “property,” sometimes is construed to refer only to real property,²⁶³ but in many jurisdictions judicial decisions have construed the term broadly to cover both real and personal property of all kinds.²⁶⁴ Judicial decisions awarding just compensation for personal property impacted by condemnation proceedings involving real property may also indicate the jurisdiction’s willingness to allow the government to condemn personal property directly.

Some courts will not require the government to compensate the property

franchises and personal property necessary or convenient for its corporate purposes. . . .”).

260. See, e.g., GA. CODE ANN. § 22-3-20 (2002) (“Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others”); N.D. CONST. art. 1, § 16 (“[N]o right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner. . . .”).

261. NEV. REV. STAT. § 37.010 (2003) (listing the public purposes for which the right of eminent domain may be exercised).

262. See, e.g., KY. REV. STAT. ANN. § 96.590 (Michie 2002) (“Any board proceeding under KRS 96.550 to 96.900 shall have the right to acquire by the exercise of the power of eminent domain, all lands, *easements*, rights of way, either upon or under or above the ground”) (emphasis added).

263. See, e.g., *Mr. Klean Car Wash, Inc. v. Ritchie*, 244 S.E.2d 553, 557 (W. Va. 1978) (“It was pointed out that our eminent domain statutes relate only to interests in real property.”).

264. See, e.g., ALASKA CONST. art. I, § 18 (“Private property shall not be taken or damaged for public use without just compensation.”); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993). “Nothing in the notion of ‘property,’ whether as used in the due process clause of the Fourteenth Amendment, which has been held (by incorporation of the just-compensation clause of the Fifth Amendment) to require just compensation when state government takes private property for a public use, or in the constitutional and statutory provisions of Illinois governing condemnation, limits condemnation and inverse condemnation to real property.” *Stroh v. Alaska State Hous. Auth.*, 459 P.2d 480, 485 (Alaska 1968) (“finding no clear legislative intent [manifesting] that personal property taken or damaged by public use should not be justly compensated”); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (“For eminent domain purposes, neither the federal nor the state Constitution distinguishes between property which is real or personal, tangible or intangible.”); *Superior Coal & Builders Supply Co. v. Bd. of Educ.*, 83 S.W.2d 875, 876 (Ky. Ct. App. 1935) (“The Constitution was written to protect the citizen from the improper acts of the state, its arms and its officers; nor does it make any difference that a portion of the plaintiff’s property was personal property, as sections 13 and 242, Ky. Const., apply to both real and personal property.”); *State Highway Comm’n v. Rollings*, 471 P.2d 324, 328 (Wyo. 1970) (“[I]t is well settled that the word ‘property’ as contained in the Fifth Amendment to the Constitution of the United States, in [section] 33, Art. I, of the Wyoming Constitution, and in [section] 1-775, for which an owner must receive ‘just compensation’ when taken or damaged by a condemnor, ‘is treated as a word of most general import and is liberally construed.’”) (citation omitted). See also *Tobin-Rubio*, *supra* note 157, at 1191-92 (discussing property interests subject to condemnation and citing various statutes and judicial decisions, some which allow condemnation of intangible property and some which do not).

owner for personal property interests when real property is condemned since a business interest such as a lease or license is arguably transferable to another location.²⁶⁵ In *Michigan State Highway Commission v. L & L Concession Co.*,²⁶⁶ a Michigan court observed that “[o]rdinarily no compensation is allowed for the goodwill or going-concern value of a business operated on the real estate being condemned.”²⁶⁷ Nevertheless, the court also noted that “since the state but rarely intends to operate the business, the courts have been unwilling to award compensation unless the destruction of the business was a necessary consequence of the condemnation.”²⁶⁸ While some jurisdictions will not require compensation for personal property associated with a real property condemnation, the Michigan court at least considered the possibility of using eminent domain power to acquire property with the intent to operate an ongoing business.²⁶⁹

In some states, legislative or constitutional language expressly declares that private property in the form of an ongoing enterprise may be subject to eminent domain. Statutory language in Alabama dealing with supplying electricity to the public provides that the county and municipal condemnation power applies to “all the property, tangible and intangible”²⁷⁰ and allows a municipal corporation or county to acquire “[a]ll or any part of any existing power plant.”²⁷¹ The Texas Constitution also allows an existing business operation to be acquired by the government for purposes of servicing the public. The Texas Constitution provides that the legislature may create Airport Authorities composed of one or more counties that have the power to exercise eminent domain to acquire “any airport or airports, landing fields and runways, airport buildings, hangars, facilities, equipment, fixtures, and any and all property, real or personal, necessary to operate, equip and maintain an airport” and “shall authorize the purchase or acquisition by the Authority of any existing airport facility publicly owned and financed and served by certificated airlines, . . . through the exercise of the power of eminent domain.”²⁷² Although Virginia allows a municipality to

265. *Mich. State Highway Comm’n v. L & L Concession Co.*, 187 N.W.2d 465, 469 n.10 (Mich. Ct. App. 1971) (“The loss of good will is not an element of compensation where the business is not taken for use as a going concern. . . . A good plumber should be able to continue his business in almost any location and do as well as he formerly did.”) (quoting *In re Edward J. Jeffries Homes Housing Project*, 11 N.W.2d 272, 276 (Mich. 1943)). *But see* OKLA. STAT. tit. 11, § 22-104-3 (2003) (“Any business or profession which is affected by the right of eminent domain as exercised pursuant to the provisions of this section shall be considered as a property right of the owner thereof and proper allowance therefor shall be made.”).

266. 187 N.W.2d 465 (1971).

267. *Id.* at 468.

268. *Id.* at 469.

269. *See also* N.M. STAT. ANN. § 3-18-10(c) (1999) (stating a municipality may “acquire by eminent domain any *existing* cemeteries, mausoleums or both, or combinations thereof”) (emphasis added).

270. ALA. CODE § 11-81-200(a) (2002).

271. *Id.*

272. TEXAS CONST. art. 9, § 12(a) & (e).

condemn electrical utility distribution facilities to serve a public purpose, the city or town must first obtain permission from the State Corporation Commission upon demonstrating “that a public necessity or that an essential public convenience shall so require” such a condemnation.²⁷³

The use of eminent domain power to provide for public utilities such as light, heat, water, and power is also authorized in some states.²⁷⁴ Although it is not always clear from the statutory language that eminent domain can be used to acquire an ongoing utility,²⁷⁵ some states specifically authorize the use of eminent

273. *Town of Blackstone v. Southside Elec. Coop.*, 506 S.E.2d 773, 777 (Va. 1998) (quoting VA. ANN. CODE § 25-233) (finding that evidence did not support a finding that “the public would benefit under the entire circumstances of the proposed condemnation”).

274. *See, e.g.*, OR. CONST. art. XI, § 12 (Peoples’ Utility Districts have authority to exercise the power of eminent domain); ARK. CODE § 14-54-701(a)(1) (2002) (“Municipal corporations shall have power to provide for, or construct, or acquire works for lighting the streets, alleys, parks, and other public places by gas, electricity, or otherwise . . .”); ARK. CODE § 23-18-307(14) (2002) (describing corporate power to provide electric power and energy, including “the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary or useful in the construction or operation of its properties”); *Niegocki v. Dennison*, 219 N.Y.S.2d 109, 111 (Sup. Ct. 1961) (“The Suffolk County Water Authority is specifically empowered to purchase water supply systems, by condemnation or direct purchase (§ 1078, Public Authorities Law.)”); *Emerald People’s Util. Dist. v. Pacificorp*, 784 P.2d 1112, 1116 (Or. Ct. App. 1990) (stating Peoples’ Utility Districts may use eminent domain to acquire existing hydroelectric power plants under ORS section 35.235(2) provided there is “public necessity for the use, necessity for the property and compatibility with the greatest public good and least private injury”). *But see* N.Y. PUB. AUTH. LAW § 1020-a (2003) and 98 N.Y. Op. Att’y Gen. (Inf.) 13 (1998) (finding that legislature establishes Long Island Power Authority to replace investor owned utility with a publicly owned power authority, but Attorney General opinion precludes municipalities from condemning facilities or assets in this service area to operate a municipal utility); OR. REV. STAT. § 262.075(3) (2001) (A joint operating agency is considered to be a municipal corporation with the power of eminent domain “however, a joint operating agency shall not condemn any properties owned by a publicly or privately owned utility which are being used for the generation or transmission of electric energy or power.”).

275. *See, e.g.*, OHIO CONST. art. XVIII, § 5 (“Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage.”); MINN. STAT. § 216B.47 (2002) (providing that a municipality may acquire the property of a public utility by eminent domain proceedings provided that the damages “include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors,” but it is not clear from the language that the municipality would be acquiring the utility as an ongoing concern); N.D. CENT. CODE § 32-15-02 (2002) (“[R]ight of eminent domain may be exercised in behalf of the following public uses: . . . electric light plants and power transmission lines . . . [o]il, gas, coal, and carbon dioxide pipelines and works and plants for supplying or conducting gas, oil, coal, carbon dioxide, heat, refrigeration, or power . . .”); TENN. CODE ANN. § 65-22-101 (2002) (empowering utility corporations “to condemn and take upon paying or securing payment thereof, to purchase or otherwise acquire, such

domain to acquire a plant and facilities from a public or private utility so long as it is within the city limits.²⁷⁶ Nebraska's statutory scheme provides that a power district can use eminent domain "to acquire from any person, firm, association, or private corporation any and all property owned, used or operated, or useful for operation, in the generation, transmission, or distribution of electrical energy,

lands and interests in and by whomsoever owned as may be necessary or advisable in the construction, maintenance, and operation of either its gas or electric plants or both") (emphasis added); *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697, 701 n.3 (Utah 1990) (finding that under Utah Constitution article I, section 22, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation," city must pay just compensation to acquire title to public utility facilities).

276. See, e.g., KY. REV. STAT. ANN. § 96.590 (Michie 2002) (authorizing eminent domain to acquire an electric plant from a public or private utility so long as the property acquired is located within the area to be served by the municipal plant); LA. REV. STAT. ANN. § 33:4175(c)(1) (West 2002) (authorizing public power authorities to "finance, *acquire*, construct, operate, and maintain facilities and to engage in the generation, production, transmission, distribution, and sale, at wholesale or retail, of electric power and energy and gas.") (emphasis added); MD. CODE ANN. PUB. UTIL. CO. § 7-210 (e)(1) (2002) ("A municipal corporation that acquires the exclusive right under subsection (d) of this section to supply electricity within an area annexed by the municipal corporation may exercise the right of eminent domain to acquire the existing installed facilities of each electric company within the annexed area . . ."); MISS. CODE ANN. § 77-3-17 (2004) ("Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality. . ."); N.M. STAT. ANN. § 3-24-1 (2003) (Certain municipalities "may acquire, maintain, contract for and condemn for use as a municipal utility privately owned electric facilities used or to be used for the furnishing and supply of electricity to the municipality or inhabitants within its service area."); VT. STAT. ANN. tit. 30, § 2910 (2002) ("[T]he municipality . . . may take such private plant and property by the exercise of the right of eminent domain."); WASH. REV. CODE § 35.92.050 (2002) ("A city or town may also construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting . . ."). But see WASH. REV. CODE § 43.52.300 (2002) (stating "an operating agency shall not be authorized to acquire by condemnation any plants, works and facilities owned and operated by any city or district, or by a privately owned public utility"). See also *City of Thornton v. Public Util. Comm'n*, 195,402 P.2d 194, 197 (Colo. 1965) (holding Colorado statutory provisions also "give full power to the municipality, subject only to the electorate, to *purchase* or acquire by condemnation *at the fair market value thereof* any water works or system and appurtenances necessary to the works or system") (emphasis in original); *In re Town of Springfield*, 469 A.2d 375, 377 (Vt. 1983) ("Where the utility currently serving the municipality refuses to sell its facilities, [section] 2910 provides that the municipality, after appropriate vote, may: take such private plant and property by the exercise of the right of eminent domain, paying therefor just compensation. . ."). But see MO. REV. STAT. § 523.0104 (2003) (stating public utility or electric cooperative does *not* have "the power to condemn property which is currently used by another provider of public utility service, including a municipality or a special purpose district" if the condemnor plans to use the property for the same or a substantially similar purpose).

including an existing electric utility system or any part thereof.”²⁷⁷ In 2003, the city of Fort Wayne, Indiana, tried to acquire part of a private water and sewer utility, arguing that state legislation expressly allowed the purchase of a public utility’s assets without a government showing of necessity for such a taking.²⁷⁸ Finally, California judicially recognized a municipal power to acquire an ongoing utility or business enterprise in the *City of Oakland v. Oakland Raiders*,²⁷⁹ discussed above.²⁸⁰ In the Raiders’ case, the California Supreme Court allowed the city’s eminent domain action over the sports franchise, concluding that state “eminent domain law authorized the taking of intangible property”²⁸¹ since “the applicable statutes authorized a city to take ‘any property,’ real or personal, to carry out appropriate municipal functions.”²⁸² The court pointed to specific legislation prohibiting the condemnation of an existing golf course, as evidence that the state legislature “has recognized a municipality’s broad eminent domain power to acquire an existing business unless expressly forbidden to do so.”²⁸³ Nevertheless, subsequent litigation in this case precluded Oakland from using eminent domain to acquire the Raiders because the action was found to violate the dormant Commerce Clause.²⁸⁴

Defining what constitutes property subject to condemnation is just one of the ways eminent domain power can be limited to avoid government abuse. Express legislative statements defining property will assist the courts in determining when private interests must yield to government necessity and will either prohibit, permit, or encourage condemnation activity. Conversely, when the legislature uses broad terminology, such as the term “property,” government abuse is more likely to occur since “property” can encompass all kinds of private rights—real and personal; tangible and intangible.

6. *Prior Public Use Doctrine*.—Many states limit the power to condemn property by scrutinizing eminent domain actions over property that is already being devoted to a public use.²⁸⁵ This limitation is referred to as the “prior public

277. NEB. REV. STAT. § 70-670 (2002) (emphasis added).

278. Leininger, *supra* note 115.

279. 646 P.2d 835, 836 (Cal. 1982).

280. See *supra* notes 153-59 and accompanying text.

281. *Oakland Raiders*, 646 P.2d at 840.

282. *Id.* at 843.

283. *Id.* (citing Government Code section 37353(c) which “provides that while a municipality may condemn land for use as a golf course, an existing golf course may not be acquired by eminent domain”).

284. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 154 (Ct. App. 1985); see also Saxer, *supra* note 4.

285. See NEV. REV. STAT. § 37.040 (2003) (Before a judgment of condemnation is entered in Nevada, the court must first find that “[i]f the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use.”). But see *State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 823 (Mo. 1994) (“The majority of decisions have allowed the condemnation of public utilities by municipalities, even though they had already been devoted to a public use.”). See generally Ralph W. Dau, *Problems In Condemnation of Property*

use doctrine” and has been described as follows:

[When a] condemnor to whom the power of eminent domain has been delegated, such as a municipality or a private corporation, seeks to exercise the power with respect to property already devoted to public use, the general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the legislature has authorized the acquisition either expressly or by necessary implication.²⁸⁶

The purpose of this doctrine is to ensure that state legislative intent is properly executed so that one public use does not destroy a public use previously authorized by the state, in order to avoid “circular, recriminatory, or serial condemnations.”²⁸⁷ Additionally, if the property is already devoted to a public use, a condemnation for the same use would probably not be considered a necessity.²⁸⁸ However, under the “compatible use theory,” this doctrine will not be applied to restrict the condemnation “if the proposed use ‘will not materially impair or interfere with or is not inconsistent with the use already existing.’”²⁸⁹

Devoted to Public Use, 44 TEX. L. REV. 1517 (1966).

286. Mark S. Arena, Comment, *The Accommodation of “Occupation” and “Social Utility” in Prior Public Use Jurisprudence*, 137 U. PA. L. REV. 233, 234 (1988) (quoting *Greater Clark County Sch. Corp. v. Pub. Serv. Co.*, 385 N.E.2d 952, 954 (Ind. App. 1979) (citations omitted)); see also *City of St. Marys v. Dayton Power & Light Co.*, 607 N.E.2d 881, 886 (Ohio Ct. App. 1992) (“As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient regardless of whether the property was acquired by condemnation or purchase.”) (quoting *Richmond Hts. v. Bd. Of County Comm’rs*, 166 N.E.2d 143, 145 (Ohio Ct. App. 1960)).

287. Arena, *supra* note 286, at 238; see also *Hodge*, 878 S.W.2d at 824 (en banc) (holding that requirement that there be express legislative authorization for eminent domain over an existing public use property “might also avoid an endless chain of one public entity after another condemning out the prior owner of the same property”).

288. *Hodge*, 878 S.W.2d at 821 (deciding whether “a waterworks system already dedicated to a public use [may] be condemned by a municipality for the very same use”).

289. Arena, *supra* note 286, at 244-45 (quoting *Georgia S. & Fla. Ry. v. State Rd. Dep’t*, 176 So.2d 111, 112 (Fla. Dist. Ct. App. 1965)). Arena also observed that “[t]his exception has been characterized as one of the means by which a court can circumvent the potentially excessive inhibitory effect of the rule—its ‘frightening inflexibility’—while preserving the rule’s policy justification ‘that an important public use should be protected.’” *Id.* at 245 (quoting Robert Phay, *The Municipal Corporation and Conflicts Over Extraterritorial Acquisitions: The Need for Land Planning*, 17 VAND. L. REV. 347, 367 (1964); Craig B. Willis, Case Comment, *Prior Public Use Doctrine: New Judicial Criteria*—*Florida East Coast Railway v. City of Miami*, 5 FLA. ST. U. L. REV. 505, 509 (1977)). See also *Hodge*, 878 S.W.2d at 822 (noting that the “consistent thread of

A Kentucky court recognized the need to limit the power to prevent a new public use that will destroy a previous public use without explicit authority.²⁹⁰ Nevertheless, in applying the "compatible use theory" the court explained that it is

a necessary consequence of the power to condemn, that this power may be exercised, not only upon private property, but upon property devoted to a public use, especially when the new use does not destroy the previous use, and when both of the uses may be enjoyed at the same time without the unreasonable impairment of either.²⁹¹

Thus, it appears that a city's attempt to condemn a utility plant already devoted to a public use will not likely be restricted by this doctrine since the "compatible use theory" can be applied to argue that new ownership by the city will not destroy or interfere with the use of the plant for the general public welfare.

Some jurisdictions weigh the degree of necessity for each of the potentially conflicting public uses to determine whether eminent domain should be employed to acquire property already being devoted to public use. This weighing requires that the proposed public use be "more necessary" than the original public use.²⁹² For example, in Idaho, the condemnor must propose to put a property currently used for public purposes to a "more necessary public use," but the "condemnor need not demonstrate a 'more necessary public use' when condemning only the right to the common use of an existing right of way previously appropriated for public use."²⁹³ Thus, just like with the "compatible use" exception to the "prior public use doctrine," the "more necessary public use" requirement is probably only applicable when the proposed use conflicts with the existing public use.

When property is already devoted to a public use and the "compatible use" exception does not apply, the eminent domain power must be conferred in express terms by specific legislative delegation and strictly followed.²⁹⁴ "The

law running through these cases is that if an existing public use will not be harmed by a new and different public use, condemnation will be allowed under a general form of authority").

290. *Louisville & N. R. Co. v. City of Louisville*, 114 S.W. 743, 746 (Ky. 1908).

291. *Id.*

292. *See, e.g., Kern River Gas Transmission Co. v. Clark Co.*, 757 F. Supp. 1110, 1118 (D. Nev. 1990) (according to Nevada law "condemnation shall not be entered if the property is already appropriated for public use unless the property sought has a 'more necessary' public use") (citing NEV. REV. STAT. § 37.040(3)); *see also* Arena, *supra* note 286, at 236 ("Some courts embrace a 'more necessary use' test, weighing the benefits to the public of the competing uses . . ."); Dau, *supra* note 285, at 1525 (noting in 1966 that "[a]t least seven states [Arizona, California, Idaho, Montana, Nevada, Oregon, and Utah] have statutory requirements that before property already appropriated to some public use can be taken by eminent domain, it must appear that the public use to which it is to be applied is a more necessary public use").

293. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 619 P.2d 122, 126 (Idaho 1980).

294. *See State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 822 (Mo. 1994). *But see* *City of Newport v. Newport Water Corp.*, 189 A. 843, 847 (R.I. 1937) ("Another principle as

rationale being that the legislature, not the subsequent condemning authority, is the proper entity to decide between mutually conflicting or destructive uses of public property.”²⁹⁵ Assuming that the “compatible use” exception is not applicable because the proposed use will result in a destruction or material impairment of the existing use, the court in a condemnation action must find express authorization for the use of eminent domain.²⁹⁶ Courts have strictly construed the specificity required for this authorization by requiring “the express use of the terms ‘the right to condemn’ or ‘the right to acquire by eminent domain’” rather than by “allowing the condemnation of public utilities under a more general statute.”²⁹⁷ Additionally, even home rule cities will not be allowed to rely on their general powers of condemnation under a state constitution because such provisions do “not constitute express statutory authority nor authority by necessary implication.”²⁹⁸

An excellent example of the prior public use doctrine being judicially applied and the legislative response to this judicial resolution is found in the litigation surrounding a New Mexico city’s attempt to condemn an electric utility system to introduce a municipally-operated utility.²⁹⁹ In *City of Las Cruces v. El Paso Electric Co.*,³⁰⁰ the city adopted a resolution to condemn an electric utility operated by a privately-owned Texas corporation.³⁰¹ The private utility company argued that since the property was already devoted to a public use, the prior public use doctrine applied, and “the legislative intent must be expressed in ‘clear and express terms, or must appear from necessary implication.’”³⁰² The court reviewed three New Mexico statutes dealing with municipal acquisition of an electric utility and determined that language such as “acquire,” “construct,” and the phrase “property may also be condemned [by any municipality] for . . . electric lines” was too vague and not sufficient to “rise to the standard of express

well settled as those above discussed is that the Legislature, in the absence of constitutional limitations to the contrary, has the right to take, from one, property already devoted to a public use and to give it to another to be devoted to the same identical public use The necessity and expediency of such a transfer are matters of legislative policy with which the courts have nothing to do. Where the Legislature clearly designates the property to be taken, it is conclusive, as such exercise of power is political”); *see also* Dau, *supra* note 285, at 1521 (“A state legislature may unquestionably validly authorize the taking of land devoted to one public use for a different public use in the absence of a constitutional prohibition.”).

295. *Hodge*, 878 S.W.2d at 822.

296. *Id.* at 823 (noting that “all of the cases holding that a municipality can condemn a public utility for its same use have required specific and express authorization from the legislature”).

297. *Id.* at 824.

298. *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238, 1251 (D. N.M. 1995).

299. *City of Las Cruces v. El Paso Elec. Co.*, 954 P.2d 72 (N.M. 1998).

300. 904 F. Supp. at 1238.

301. *Id.* at 1243-44.

302. *Id.* at 1249 (reviewing an earlier New Mexico decision, *City of Albuquerque v. Garcia*, 130 P. 118, 124 (N.M. 1913) (discussing the prior public use doctrine)).

statutory language nor authority by necessary implication.”³⁰³

The federal court in the *City of Las Cruces* litigation explained that the prior public use doctrine “cannot be invoked against a condemnor municipality if there is no destruction, obliteration or material impairment of the existing use” because of the “compatible use” exception to the doctrine.³⁰⁴ The court refused to certify the issue of “a municipality’s authority to condemn an existing electric utility system”³⁰⁵ to the New Mexico Supreme Court until it resolved the factual determination of whether the City’s condemnation action constituted “destruction, obliteration or material impairment” of the existing use.³⁰⁶ Upon resolving the evidentiary issue of “compatible use” against the City because “the City failed to meet its burden of showing that there would be no material impairment,”³⁰⁷ the federal court certified the condemnation issue to the New Mexico Supreme Court.³⁰⁸ The state supreme court interpreted the certified question to be “whether the City’s showing justified application of the compatible use exception, permitting condemnation, or required application of the prior public use doctrine, precluding condemnation.”³⁰⁹

After the federal court decision in 1995, but before the 1998 New Mexico Supreme Court decision dealing with the certified question, “[t]he New Mexico Legislature acted in the 1997 session to provide express authority to the City.”³¹⁰ The Legislature amended several statutes, including Section 3-24-1(e), which now provides that municipalities of a particular population have the right to “acquire, maintain, contract for and condemn for use as a municipal utility privately owned electric facilities.”³¹¹ Finding that the Legislature acted to give the City specific authority to condemn the private electric utility before the court answered the certified question, the New Mexico Supreme Court concluded that the case was moot.³¹²

Ideally, the state legislature should decide whether or not it wants to allow municipalization of utilities or other ongoing business enterprises. Since a municipality will be required to show it is using its condemnation power for a

303. *Id.* at 1250-51 (reading the three electric utility condemnation statutes together and finding that “the City does not have the necessary legislative authority under New Mexico statutes to condemn EPEC’s electric utility system”).

304. *Id.* at 1252.

305. *Id.* at 1256.

306. *Id.* at 1252-55 (noting that “[i]t is not enough, however, that some inconvenience may occur to the prior user; to constitute destruction, obliteration or material impairment, there must be strong evidence that the new use will eradicate or materially impair the prior use” and that “this question must be analyzed from the perspective of the user public”).

307. *City of Las Cruces v. El Paso Elec. Co.*, 954 P.2d 72, 76 (N.M. 1998).

308. *Id.* at 74.

309. *Id.* at 76 (construing the certified question narrowly so as not to conduct an appellate review of the federal court’s written opinion and order).

310. *Id.* at 76.

311. *Id.* at 76-77.

312. *Id.* at 77.

public purpose, it is likely that any ongoing enterprise it seeks to acquire will already be devoted to a public use, as in the case of a privately-owned public utility. Therefore, to avoid the limitations of the “prior public use” doctrine, state legislative provisions promoting municipalization should expressly authorize the use of eminent domain power to acquire any “prior public uses.”³¹³ The New Mexico Legislature, as described in the litigation above, did just that, resulting in the municipality being allowed to use its power to acquire a privately-owned public utility.

It may be that the “compatible use” exception to the prior “public use” doctrine will allow municipalization which does not interfere with or destroy the public’s use. Express legislative authority will avoid the potential problem that occurred in New Mexico where the City was unable to meet its burden of proof that its proposed use was compatible. Kentucky addresses the problem of duplicate or conflicting public uses by legislatively requiring that a municipality acquire an existing public utility plant or facility by purchase or by eminent domain rather than by constructing a similar plant or facility.³¹⁴ However, since home rule cities will not be affected by state legislative pronouncements concerning only local concerns,³¹⁵ home rule cities wishing to use eminent domain to acquire property previously devoted to a public use may need to establish express local legislative authority.

7. *Additional Constraints on Eminent Domain Power.*—A final state constraint over a municipality’s exercise of eminent domain to acquire a privately-owned public utility exists in some states which require the approval of a state public utilities commission.³¹⁶ Requiring approval at the state level by

313. See Gray, *supra* note 120, at B2 (discussing Massachusetts communities attempting to municipalize electric companies and explaining that “the state law, as it now reads, needs clarification if municipalization is to become feasible for a city or town at this time”).

314. KY. REV. STAT. § 96.045(1).

No municipality, in which there is located an existing electric, water or gas public utility plant or facility shall construct or cause to be constructed any similar utility plant or any similar public utility facility duplicating such existing plant or facility or to obtain or acquire any similar public utility plant or facility other than by the purchase of the existing plant or facility or by the acquisition of such existing plant or facility by the exercise of the power of eminent domain.

315. See, e.g., *City of New York v. Patrolmen’s Benevolent v. Ass’n of City of New York, Inc.*, 642 N.Y.S.2d 1003, 1009 (Sup. Ct.) (“[W]hile the Home Rule provision grants the City significant power and authority to act with respect to local matters nothing in the Home Rule provision is intended to impair the power of the Legislature to act in relation to matters of State concern notwithstanding the fact that the State’s concern may also touch upon the City’s property, affairs or government.”), *aff’d*, 647 N.Y.S.2d 728 (App. Div.), *aff’d*, 676 N.E.2d 847 (N.Y. 1996).

316. See, e.g., James Vaznis, *Water Takeover on Ballot*, BOSTON GLOBE, Mar. 9, 2003, at 1 (discussing a group of New Hampshire communities attempting to buy a publicly traded water utility and stating that “New Hampshire law allows a municipality to take a utility by eminent domain; the state Public Utilities Commission must approve any resulting deal”); James Vaznis, *Pennichuck Deal Opens Taps on Two Fronts*, BOSTON GLOBE, Aug. 14, 2003, at 1.

a public utilities commission will help prevent government abuse of the condemnation power at the local level. State concerns about the impact of municipalization, particularly when it affects surrounding communities, will more readily be addressed when state approval is part of the municipalization process.

While it is beyond the scope of this article to explore federal constitutional constraints on eminent domain power,³¹⁷ local and state government power to condemn may be limited by federal constitutional and statutory law. As discussed above,³¹⁸ the California Court of Appeal in *City of Oakland v. Oakland Raiders*,³¹⁹ prohibited Oakland from using its eminent domain power to acquire the Raiders football team because the action was found to violate the dormant Commerce Clause.³²⁰ Additionally, state and local power may be limited by the Supremacy Clause and federal pre-emption, the Contracts Clause,³²¹ and federal antitrust legislation.³²² The federal government's power to condemn may be limited by the Commerce Clause and state sovereignty under the Tenth Amendment.³²³

CONCLUSION

Municipal officials seeking to promote the general welfare of their communities may consider the municipalization of public utilities to be an appropriate response to increasing service costs, decreasing reliability, and corporate abuse. Events such as the California energy crisis in 2001, followed by the Northeast blackout in August 2003,³²⁴ have increased the public's awareness of its susceptibility to situations where market manipulation or skewed economic incentives may result in unstable and costly public utility service.³²⁵

Public utilities have historically alternated between private and public ownership, public regulatory control, and deregulation with market competition. Following the unregulated and competitive stage of the later 1800s, the

317. See Saxer, *supra* note 4.

318. See *supra* notes 150-56, 277-82 and accompanying text.

319. 220 Cal. Rptr. 153 (Ct. App. 1982).

320. *Id.*; see also Saxer, *supra* note 4.

321. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . .").

322. See Rossi, *supra* note 77, at 1786-89 (discussing "regulatory federalism doctrines" such as federal preemption, the Supremacy Clause, the dormant Commerce Clause, and antitrust laws).

323. See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 769-70 (1982) (upholding Titles I and II of the Public Utility Regulatory Policies Act (PURPA) against a Tenth Amendment challenge to congressional activity).

324. Nancy Gibbs, *Lights Out*, TIME, Aug. 25, 2003, at 30, 37 (noting that "the blackout of 2003 affected eight states and 50 million people and could cost up to \$5 billion").

325. See Duane, *supra* note 87, at 529-30 (discussing the impact of public versus private ownership of the public power system in California and noting that "the public simply provides the money while the private sector provides the monopoly power to keep the lights on").

municipalization and public regulatory models for utilities were proposed because of deteriorating operations and services, antitrust violations, and political corruption in the granting of private charters and franchises. The regulatory model prevailed over municipalization because of concerns about political corruption in city management and the fear of socialism. This regulatory state lasted for almost a century, but is being replaced by a market approach, evident in the 1978 Public Utility Regulatory Policies Act (PURPA), which encourages market-based rates for conventional fuels.

Recent abuses by the electricity industry have resulted in decreased service and increased rates, leading consumers and city officials to question the wisdom of reducing regulatory control to allow competition. Some municipalities are responding to these concerns by establishing municipal services instead of attempting to regulate or control investor-owned public utilities. As part of this municipalization process, cities attempted to acquire part or all of these investor-owned utilities through voluntary purchase or eminent domain. Utilities have resisted these efforts by refusing to sell and forcefully litigating the resulting condemnation suits.

Allowing local government to force the sale of private ongoing enterprise opens the door to a myriad of condemnation actions converting private free enterprise to municipal ownership. A fear of piecemeal socialization through the use of eminent domain power requires that we examine how this potential for government abuse should be managed using existing or revised federal, state, and local statutory and constitutional provisions. This Article reviewed current state statutory and constitutional guidelines to constrain the eminent domain power and concludes by suggesting that each state must decide whether it wishes to encourage or discourage the municipalization of utilities and other public services and expressly declare this intent in statutory and/or constitutional provisions.

Although local governments will need to conduct extensive assessments to decide whether or not to municipalize for the benefit of its citizens, lawmakers at the state level should ensure that the eminent domain power is appropriately restricted to avoid government abuse. It will likely not be helpful to restrict the definition of what constitutes a “public use” under the Fifth Amendment or the state eminent domain declaration since municipalization of a public function, under even a restrictive or narrow definition, will probably qualify as a “public use.” Alternatively, the state could restrict its delegation of the state’s eminent domain power so that local government entities do not have the power to condemn certain activities unless the state has decided it wants to encourage municipalization of services such as utilities. Home rule cities will be allowed to determine their own approach toward municipalization unless such efforts are viewed as a matter of mixed local and state concern and are not sufficiently local in nature to assure local autonomy over matters controlled by conflicting state legislation.

Other state restrictions on local government eminent domain require that the power only be used to acquire property “necessary” for the public good. Jurisdictions vary as to whether this “necessary” determination is made judicially or legislatively. If the property is already being used for a public purpose, the

eminent domain power may restrict condemnations to facilitate municipal ownership since it may not be "necessary" for the public good to municipalize a function already being preformed by private enterprise. Indeed, in some jurisdictions the "prior public use doctrine" precludes the government from condemning property already devoted to public use unless the proposed use will not interfere or conflict with the existing use under the "compatible use theory." State and local governments can avoid these restrictions by expressly conferring eminent domain power to condemn property already devoted to a public use or support these limitations by legislatively enacting a "prior public use" restriction.

Finally, expressly defining what "property" is subject to condemnation is an effective way for the state to restrict the government's eminent domain power over private enterprise. The definition of "property" can be legislatively or constitutionally restricted to "real property" or can specifically preclude the condemnation of an ongoing private enterprise, even if a valid public purpose will be served.

Ultimately, state and local citizens will need to decide whether controlling government abuses of the eminent domain power by legislatively or constitutionally restricting the extent of this power against ongoing private enterprise will unduly limit the government's flexibility and power to promote the best interests of the public. While judicial review of government eminent domain action may be an effective way to curb abuse, eminent domain legislation and constitutional interpretations have historically been broad and deferential to an expanded use of this power. Although the extent and scope of the condemnation power varies by jurisdiction, each state should discern the limits and structure of this power as it applies to ongoing enterprises. Citizens should intentionally choose to either legislatively expand this power to promote the flexibility needed by government to municipalize or to legislatively prevent the government from acquiring an ongoing enterprise.

NATIONAL INGRATITUDE: THE EGREGIOUS DEFICIENCIES OF THE UNITED STATES' HOUSING PROGRAMS FOR VETERANS AND THE "PUBLIC SCANDAL" OF VETERANS' HOMELESSNESS

FLORENCE WAGMAN ROISMAN*

"The government should 'provide against the possibility that any [person] . . . who honorably wore the Federal uniform shall become the inmate of an almshouse, or dependent upon private charity. . . . [I]t would be a public scandal to do less for those whose valorous service preserved the government.'"¹

"I have the obligation as the commander in chief to go thank them for their service, to comfort them, to make sure that they are getting what they need."²

"Conservatively, one out of every four homeless males who is sleeping in a doorway, alley, or box in our cities and rural communities has put on a uniform and served our country."³

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1. 1888 Republican Party Platform, *reprinted in* 1 DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS 82 (1978).

2. BOB WOODWARD, PLAN OF ATTACK 280 (2004) (quoting President George W. Bush).

3. National Coalition for Homeless Veterans, *Background & Statistics*, at <http://www.nchv.org/background.cfm> (last visited Oct. 20, 2004).

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INTRODUCTION

This Article examines the nature and extent of housing assistance provided by the United States government to veterans of its military service.⁴ It finds that assistance remarkably limited and inconsistent with our nation's history and rhetoric, providing a sobering corrective for those who wish to believe that public policy in the United States progressively becomes more humane or that national declarations are matched by national performance. The Article also considers the reasons and potential cures for these inadequacies and inconsistencies.⁵

In the late nineteenth century, the United States offered generous assistance, including housing, to disabled and elderly veterans. It was generally agreed that the government owed this debt to veterans with service-connected disabilities;⁶

4. The Article does not address the government's provision of housing assistance to those who are on active military duty or (except incidentally) to the survivors of servicepeople or veterans. Studies indicate that many servicepeople live in egregiously substandard housing and that some experience literal homelessness. For discussions of the inadequacy of housing for people on active military duty, see Pamela C. Twiss & James A. Martin, *Conventional and Military Public Housing for Families*, 78 SOC. SERV. REV. 240 (1999); INTERAGENCY COUNCIL ON THE HOMELESS, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE, FINDINGS OF THE NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS, TECHNICAL REPORT 11-2 (1999) [hereinafter NSHAPC] ("4 percent [of homeless people interviewed] say that they were in the military at the time they were interviewed for [the] study"); Chester Hartman & Robin Drayer, *Military Family Housing: The Other Public Housing Program*, in CHESTER HARTMAN, BETWEEN EMINENCE & NOTORIETY: FOUR DECADES OF RADICAL URBAN PLANNING 233 (2002); Elizabeth Becker, *Army's Newest Objective is Livable Family Housing*, N.Y. TIMES, Feb. 7, 2000, at A12 (stating that housing is a major reason that "midcareer service members leave the armed forces"); Editorial, *Paying the Troops*, N.Y. TIMES, Feb. 15, 2001, at A30 (stating that "[m]ore than 5,000 American military personnel still need food stamps to balance their monthly budgets" and that "[h]ousing conditions are even more scandalous. Of the 300,000 military housing units, 200,000 are rated inadequate by the service's own minimal standards").

5. While there have been studies of educational programs for veterans (see, e.g., KEITH W. OLSON, THE G.I. BILL, THE VETERANS, AND THE COLLEGES (1974); Suzanne Mettler, *Bringing the State Back in to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans*, 96 AM. POL. SCI. REV. 351 (2002)), the housing programs have received virtually no critical or scholarly attention. See Kathleen Frydl, Book Review, 17 LAW & HIST. REV. 200, 200 (1999) (reviewing PATRICK J. KELLY, CREATING A NATIONAL HOME: BUILDING THE VETERANS' WELFARE STATE 1860-1900 (1997)) (noting "the scant attention that the Veterans Administration has received from historians"). I hope that this Article will provoke further consideration of these problems.

6. See THE PRESIDENT'S COMM'N ON VETERANS' PENSIONS, 84TH CONG., THE HISTORICAL DEVELOPMENT OF VETERANS' BENEFITS IN THE U.S., A REPORT ON VETERANS' BENEFITS IN THE U.S. 65 (Comm. Print 1956) [hereinafter REPORT ON VETERANS' BENEFITS]:

There has never been any question but that it is the Government's duty and responsibility to provide, and to provide generously, for those who, while or as a result

and a post-Civil War consensus extended that obligation to encompass all veterans with disabilities and all elderly veterans.⁷ The rationale was that veterans had earned this compensation from the federal government, and that it would be shameful to allow veterans to suffer want or be forced to rely on state or local aid or private charity.⁸

In the late twentieth and early twenty-first centuries, however, veterans' housing programs assist relatively few veterans.⁹ Many veterans and their

of serving their country in time of war, suffered disease or injury which resulted in their being unable to support themselves—in other words, those with service-connected disability Also, there has been no question as to the Government's responsibility to the dependents of those veterans who died as a result of their service in time of war.

7. See Judith Gladys Cetina, *A History of Veterans' Homes in the United States, 1811-1930*, at 2 (1977) (unpublished Ph.D. dissertation, Case Western University) (“[B]y the mid 1880s, a veteran disabled by wounds or the infirmities of old age who had participated in any of the major wars of the century . . . could find shelter in one of the branches of the National Home for Disabled Volunteer Soldiers (NHDVS) or in one of the many state soldiers' institutions. The professional soldier or career naval man in need of shelter could seek admission to either the U.S. Soldiers' Home in Washington, D.C. or the U.S. Naval Home in Philadelphia, Pennsylvania.”); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 141 (1992) (stating that “in 1884 a new law specified that the branches of the National Home could take in elderly veterans without requiring them to have disabilities linked to wartime injuries”); *REPORT ON VETERANS' BENEFITS*, *supra* note 6, at 65-66 (Faced with the alternative of “do[ing] nothing for the man, thus incurring the criticism that the Government was allowing the men who fought and suffered for it to go unattended in their time of want,” the government usually decided to succour “all veterans with or without restrictions as to disability, age, or indigency.”).

8. SKOCPOL, *supra* note 7, at 150 (“[H]onorable and generous public provision for Civil War veterans was openly defined in opposition to demeaning provision for paupers. The point was to keep these deserving men and those connected to them from the degrading fates of private charity or the public poorhouse.”); see also KELLY, *supra* note 5, at 3 (deprecating “oblig[ing] these veterans] to seek an asylum in the almshouses of the country”); *id.* at 14 (quoting the leaders of Boston's Discharged Soldiers' Home, who said in 1863 that “it cannot be presumed that the Government will long allow its heroic defenders to be dependent on public charity in any form, however delicately or cordially it may be extended”); *CONCISE DICTIONARY OF AMERICAN BIOGRAPHY* 10-11 (Joseph L. Hawkins ed. 1964) (quoting Gen. Josiah Perham as stating, in 1865, that “[t]he poor soldier broken in health, or maimed . . . should not return to be the object of capricious common charity; he should have a nation's gratitude, a nation's care, a place in the nation's household, a seat by the nation's fireside”); *REPORT ON VETERANS' BENEFITS*, *supra* note 6, at 66-67 (“The philosophy is discernible that the Government ought to help the veteran when he is down, on the basis that he is a veteran. This seems to be largely the philosophy which prevailed up until World War II.”).

9. See *THE ENCYCLOPEDIA OF HOUSING* 116 (Willem Van Vliet ed., 1998) (reporting that “about 1% of veterans hold VA loans”). An unknown number of veterans receive federal housing assistance under programs that are available to the general public, including programs administered by the Department of Housing and Urban Development (HUD) and the Department of Agriculture

families pay far more than they can afford for shelter or live in overcrowded or otherwise substandard dwellings,¹⁰ and well over half a million veterans—some with dependent spouses and children—experience homelessness each year.¹¹

(DoA), and the Low Income Housing Tax Credit Program (LIHTC) and tax advantages provided by the Department of the Treasury. It would be very helpful if other housing programs collected and reported statistics on the number of veterans they serve. *See* Anne B. Shlay & Charles E. King, *Beneficiaries of Federal Housing Programs: A Data Reconnaissance*, 6 HOUSING POL’Y DEBATE 481, 481-83, 486 (1995) (“data are key” for monitoring compliance with requirements).

10. *See* MARY ELLEN HOMBS, *AMERICAN HOMELESSNESS: A REFERENCE HANDBOOK* 63 (3d ed. 2001) (discussing housing burdens in the general population, which includes veterans); NATIONAL LOW INCOME HOUSING COALITION, *LOSING GROUND IN THE BEST OF TIMES: LOW INCOME RENTERS IN THE 1990s*, at 5 (Mar. 2004), *available at* <http://www.nlihc.org/research/losingground.pdf>. It appears that no statistics are kept regarding housing burdens of veterans as distinct from the general population.

11. Estimates of numbers of homeless people are notoriously unreliable, depending upon variations in defining “homelessness” and different protocols for compiling statistics. *See, e.g.*, MARTHA BURT ET AL., *HELPING AMERICA’S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING?* 28 (2001). With respect to homeless veterans in particular, the Department of Veterans Affairs (DVA), a department of the federal government, estimated in the 1990s that some 250,000 veterans were homeless on any given night, twice that many over the course of a year. Press Release, DVA, *VA Programs for Homeless Veterans* (June 1999), *at* <http://www.va.gov/pressrel/99624hmls.htm>; 1990 ANNUAL REPORT, INTERAGENCY COUNCIL ON THE HOMELESS 248 (1991) (stating that between 150,000 and 250,000 veterans are homeless each night). More recently, the DVA has amended this to say that “it has been estimated that more than 200,000 veterans may be homeless on any given night and that twice as many veterans experience homelessness during a year.” DVA, *Fact Sheet: VA Programs for Homeless Veterans* (Dec. 2004), *at* <http://www1.va.gov/opa/fact/hmlssfs.html> [hereinafter DVA Fact Sheet Dec. 2004]. While the statement that “more than 200,000 veterans may be homeless on any given night” is not inconsistent with the statement that the number of veterans homeless on any given night is 250,000, the change certainly seems designed to suggest that the number of homeless veterans was smaller in 2003 than it was in the 1990s. Unfortunately, there is absolutely no basis for that suggestion; indeed, for several reasons, the likelihood is that even the 250,000 per night, half-million per year, estimate is too low.

In 1991, the National Coalition for the Homeless considered that estimate too low. *See* NATIONAL COALITION FOR THE HOMELESS, *HEROES TODAY, HOMELESS TOMORROW?: HOMELESSNESS AMONG VETERANS IN THE UNITED STATES* 2 (Nov. 1991) [hereinafter *HEROES TODAY, HOMELESS TOMORROW?*]. One of the most thorough studies of homelessness was the National Survey of Homeless Assistance Providers and Clients (NSHAPC), undertaken in 1996, nine years prior to the publication of this Article. *See* BURT ET AL., *supra* note 11, at 16-17. NSHAPC data indicate that the number of people who may have experienced homelessness during a year beginning in February 1996 was 3.5 million. *Id.* at 49-50. Using that total, and the estimate that about 34% of homeless people are in families, yields the result that some 2.32 million single people may have experienced homelessness in that year. *See id.* at 33. Using the estimate that 23% of homeless adults are veterans produces the result that some 533,600 single veterans may have experienced homelessness in that year, not including veterans who are in families (which is the case for many women veterans). *See, e.g.*, NSHAPC, *supra* note 4, at 11-2, 11-3; GAO, *HOMELESS*

Moreover, many of those homeless veterans suffer service-connected disabilities, and therefore are veterans to whom the federal government owes a special obligation.¹² Rather than accept responsibility for these homeless veterans, the

VETERANS: VA EXPANDS PARTNERSHIPS, BUT HOMELESS PROGRAM EFFECTIVENESS IS UNCLEAR, GAO/HEHS-99-53, at 1 (Apr. 1, 1999) [hereinafter GAO REPORT].

NSHAPC's numbers may have underestimated the number of homeless persons in 1996. *See* HOMBS, *supra* note 10, at 62-63 (discussing other studies of homelessness). Moreover, several studies suggest that the numbers of homeless people increased in at least some of the years since 1996. *See, e.g.,* THE U.S. CONFERENCE OF MAYORS—SODEXHO USA, HUNGER AND HOMELESSNESS SURVEY, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES (Dec. 2004) app. (indicating increases in demand for shelter from 1998 to 2003), *available at* <http://www.usmayors.org/uscm/hungersurvey/2004/online-report/HungerandHomelessnessReport2004.pdf>; Joel Stein et al., *The Real Face of Homelessness*, TIME, Jan. 20, 2003, at 54 (Time magazine's survey of eight jurisdictions with relatively reliable statistics showed year-over-year increases in either 2001 or 2002 of homeless parents and children); INSTITUTE FOR THE STUDY OF HOMELESSNESS AND POVERTY, HOMELESSNESS IN LOS ANGELES: A SUMMARY OF RECENT RESEARCH 5, 8 (March 2004) [hereinafter HOMELESSNESS IN LOS ANGELES]; Jennifer Steinhauer, *Advocates for Homeless Offer Cautious Praise for City Changes*, N.Y. TIMES, Feb. 27, 2004, at B1 (stating that "[i]n the past few years, the number of homeless families in the shelter system has risen significantly . . . [.] an increase of almost 50 percent since 2001").

Furthermore, with respect to the multiplier, note that "[c]ounts estimating the number of homeless people over a period of a year are commonly three or more times larger than point-in-time counts." HOMELESSNESS IN LOS ANGELES, *supra*, at 8 (reporting ratios between 2.8 and 5); *see also* BURT ET AL., *supra* note 11, at 14 (discussing "evidence that the number of people who experience homelessness during the course of a year or longer could be as much as six times the number homeless at any given time") (citation omitted). All of these are reasons to believe that the number of homeless veterans is far higher than 250,000 per night and 500,000 in any given year.

In addition, none of this takes into account, as the DVA Fact Sheet states, that "[m]any other veterans are considered at risk [of homelessness] because of poverty, lack of support from family and friends and precarious living conditions in overcrowded or substandard housing." *See* DVA Fact Sheet Dec. 2004, *supra*.

12. The Department of Veterans Affairs ("DVA" or "VA") reports that "the vast majority of homeless veterans" suffer disabilities. Fund Availability Under the VA Homeless Providers Grant and Per Diem Program, 68 Fed. Reg. 34,489 (June 9, 2003). These disabilities include mental illness, substance abuse disorders, arthritis, rheumatism and other joint problems, high blood pressure, and Post Traumatic Stress Disorder ("PTSD"). *Id.*; NSHAPC, *supra* note 4, at 11-6; Paula P. Schnurr et al., *Randomized Trial of Trauma-Focused Group Therapy for Posttraumatic Stress Disorder: Results from a Dep't of Veterans Affairs Cooperative Study*, 605 ARCHIVES GEN. PSYCHIATRY 481 (2003).

While we do not know how many of these are service-connected disabilities, it is reasonable to assume that a substantial number are. *See* JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES 29 (1992) (stating that "many" of the Viet Nam veterans have service-connected disabilities); REPORT ON VETERANS' BENEFITS, *supra* note 6, at 65 (stating that, in the past, when it was not clear whether a veteran's disabilities were service-connected, the government has followed a "prevailing principle that the veteran should be given the benefit of the doubt").

federal government has abandoned them to the mercies of state and local governments and private charities, remitting many of them to the streets or to shelters that are today's equivalent of the poorhouses and almshouses that were to be avoided for veterans in the nineteenth century.¹³

This failure to provide for veterans has occurred despite intervening proclamations that decent housing is the right of all human beings, internationally and in the United States. In 1941, President Franklin Roosevelt asserted that all Americans should live in "Freedom from Want,"¹⁴ and the 1948 Universal Declaration of Human Rights—inspired in part by Roosevelt's 1941 address¹⁵—proclaimed that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, [and] housing."¹⁶ In the 1949 National Housing Act, the Congress of

The number of people with service-connected disabilities has grown dramatically with the wars in Afghanistan and Iraq. On May 5, 2004, CNN reported the medical evacuation of 40,000 service members from Iraq since the war began. *CNN Newsnight Aaron Brown* (CNN television broadcast, May, 5, 2004), available at <http://edition.cnn.com/TRANSCRIPTS/0405/05/asb.00.html>. Sixteen percent of veterans of operations in Iraq and Afghanistan who have separated from military service, or 26,633, "had filed [disability] benefits claims with the VA for service-connected disabilities" as of April 2004. Josh White, *Influx of Wounded Strains VA*, WASH. POST, Oct. 3, 2004, at A01 (citing a VA accounting).

13. See, e.g., Dan Barry, *Home from Iraq, and Without a Home*, N.Y. TIMES, Apr. 24, 2004, at A12; Dan Barry, *War Veteran Finds Home Has a Heart*, N.Y. TIMES, May 29, 2004, at A13 (describing an honorably discharged veteran of the war in Iraq who, with her young child, suffered homelessness in New York City; a month after the story appeared, she was living in an apartment in a building owned by the New York Coalition for the Homeless); see SKOCPOL, *supra* note 7, at 67-101 for the nineteenth century view; see also HEROES TODAY, HOMELESS TOMORROW?, *supra* note 11, at vi (stating that "some of our troops who fought in Desert Storm are homeless already [in 1991]. Their homecoming has resulted in little more than a parade to the shelter").

For an anticipation of what seems to be the twenty-first century situation, see KELLY, *supra* note 5, at 45-46 (Urging relief for disabled soldiers in 1864, Frederick Knapp prophesied that delay would deplete the public's sympathy for disabled soldiers. Kelly quoted Knapp, who wrote, prophetically, "We shall get *accustomed* to it—and communities will accept the fact & pressure of a larger number of these disabled men among them, struggling for . . . a livelihood, just as they accept the fact of the vast mass of *permanent poverty* in their midst.") (emphasis in original).

14. President Franklin D. Roosevelt, State of the Union Speech (Jan. 6, 1941), in 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 672 (Russell & Russell 1969) (1950) [hereinafter PUB. PAPERS].

15. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 176 (2001).

16. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 25, G.A. Res. 217 A, U.N. Doc. A/810 (1948). The United States also has signed (though not ratified) the International Covenant on Economic, Social, and Cultural Rights, which also recognizes the human right of every person to "an adequate standard of living," including housing. See Office of the United Nations High Comm'r for Human Rights, *Ratifications and Reservations*, at <http://www.ohchr.org/english/countries/ratification/3.htm> (last updated Nov. 24, 2004).

the United States declared the national housing goal to be “the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family,”¹⁷ and Congress re-affirmed that goal in 1968.¹⁸ There also have been rhetorical commitments to adequate provision for veterans in particular. President Lincoln concluded his Second Inaugural Address with the exhortation that now is engraved over the entrance to the building that houses the Department of Veterans Affairs: “to care for him who shall have borne the battle and for his widow and his orphan.”¹⁹ President Franklin Roosevelt, when signing the G.I. Bill of Rights into law on June 22, 1944, said that members of the armed forces “have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems.”²⁰ In accordance with President Roosevelt’s reference to entitlement, popular opinion has considered that the G.I. Bill embodies “a soldier’s *right* to fair treatment from a grateful nation.”²¹

The G.I. Bill, in general, has been hailed as creating an “American welfare state for veterans and their families,”²² a “universal”²³ program that establishes

17. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (codified as 42 U.S.C. § 1441 (2000)). See BRUCE HEADEY, *HOUSING POLICY IN THE DEVELOPED ECONOMY: THE UNITED KINGDOM, SWEDEN AND THE UNITED STATES* 14 (1978) (discussing similar statements in Sweden (1967) and Britain (1961) and characterizing the U.S. statement as made “[w]ith greater bombast but even less prescience”).

18. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476, 476 (1968) (codified as 42 U.S.C. § 1441 (2000)). See also Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL’Y DEBATE 223 (1998).

19. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989*, at 142, 143 (1989); Veterans Benefits Administration, *Leadership Covenant of the Veterans Benefits Administration* (June 28, 2002), at <http://www.vba.va.gov/> (stating that Lincoln’s words “are found in every VA office and convey the sanctity of our mission”).

20. Franklin D. Roosevelt, *The President Signs the G.I. Bill of Rights* (June 22, 1944), in 13 *PUB. PAPERS*, *supra* note 14, at 180, 181; Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 587 (commonly known as the G.I. Bill of Rights).

21. See, e.g., *I’LL BUY THAT!: 50 SMALL WONDERS AND BIG DEALS THAT REVOLUTIONIZED THE LIVES OF CONSUMERS* 74 (1986) (emphasis added); *Legion Bill Asks Wide Veteran Aid*, N.Y. TIMES, Jan. 9, 1944, at 28 (quoting Congressman John E. Rankin as describing the proposed G.I. Bill as “the minimum of the just dues owed to the men and women of the armed forces for their services in the preservation of the nation in World War II”).

22. Edwin Amenta & Theda Skocpol, *Redefining the New Deal: World War II and the Development of Social Provision in the United States*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 81, 81-82 (Margaret Weir et al. eds., 1988); see also GEOFFREY PERRETT, *DAYS OF SADNESS, YEARS OF TRIUMPH: THE AMERICAN PEOPLE 1939-1945*, at 341-42 (1973) (describing veterans’ benefits as “a variety of Socialism”).

23. SAR A. LEVITAN & JOYCE K. ZICKLER, *SWORDS INTO PLOWSHARES: OUR GI BILL* 7 (1973).

a “happy ending” for all veterans.²⁴ On the contrary, however, the housing program created by the G.I. Bill was an extremely limited measure that was available only to some veterans and provided eligible veterans with restricted aid. The program served the interests of industries more than the needs of veterans. The ironic reality is that since the enactment of the housing provisions of the G.I. Bill of Rights, government housing assistance has been unavailable to most veterans, particularly for veterans and veterans with service-connected disabilities, who have the strongest claim on and greatest need for government help.

Whatever may be the case with respect to the educational and other provisions of the G.I. Bill,²⁵ the housing provisions of the G.I. Bill never did, and do not now, “take care of [veterans’] special problems”²⁶ or provide to all or even most veterans a “rich bounty,”²⁷ or “fair treatment from a grateful nation.”²⁸ The housing provisions excluded some people by design and others by administration and left a legacy of veterans living in unaffordable, overcrowded, or otherwise substandard housing, in shelters and in cars, and literally on the streets.

The substandard housing and homelessness suffered by veterans—particularly those with service-connected disabilities—is inconsistent with the long-standing understanding that the nation owes a debt to its veterans, with the nation’s history, and with the nation’s rhetorical commitments. The goal of this Article is to illuminate these inconsistencies, to consider why these contradictions exist, and to propose ways of assuring that every veteran has access to decent, affordable housing.

Part I of this Article describes the development of housing assistance for veterans in the United States from the Civil War to 2004. The focus is on the period after the 1944 enactment of the G.I. Bill of Rights, which created a veterans’ housing program that provided only homeownership assistance. Part II discusses one of the consequences of the decision to offer that homeownership assistance only: the exclusion from the G.I. Bill’s housing program of women, veterans of color, and veterans for whom homeownership is infeasible or unaffordable. Part III considers some reasons why only homeownership may have been offered as the response to a problem far too broad to be solved by homeownership. Part IV proposes possible solutions to the current crisis with respect to veterans’ housing, outlining what could be done to help veterans who are suffering housing problems, including homelessness.

24. DAVIS R.B. ROSS, PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II, at 3 (1969) (“This story of the origins of the United States’ policy for able-bodied veterans of World War II ends happily”; “[n]ever has a nation lavished so many material benefits upon its heroes”; “World War II veterans received a rich bounty.”).

25. See, e.g., Mettler, *supra* note 5.

26. See *supra* note 20 and accompanying text.

27. See *supra* note 24 and accompanying text.

28. See *supra* note 21 and accompanying text.

I. THE DEVELOPMENT OF VETERANS' HOUSING PROGRAMS IN THE UNITED STATES FROM THE CIVIL WAR TO 2004

A. *Veterans' Housing from the Civil War to 1932*

Some students of the subject maintain that nations traditionally are ungrateful to their veterans. Davis R.B. Ross sees the origin of this reaction in the *Odyssey*, which, he writes, "may be said to be a classic description of how societies treat their war veterans."²⁹ After victory, Ross suggests, those at home "discard rapidly (if ever they held them) feelings of obligation and gratitude to veterans."³⁰ Richard Severo and Lewis Milford agree that "[t]here were times in American history, including recent history, when such soldiers were lured into service with offers of generous pay, bonuses, and benefits, only to be scorned as mercenaries and social parasites when they tried to collect their due."³¹ They write that "[t]hroughout American history, even after 'popular' wars, veterans have had to struggle against a Government that has mostly sought to limit its financial liability, more like a slippery insurance company than a polity rooted in the idea of justice and fair reward."³²

As Theda Skocpol and others have shown, however, the federal government's provision for veterans after the Civil War "evolved from a restricted program to compensate disabled veterans and the dependents of those killed or injured in military service into an open-ended system of disability, old-age, and survivors' benefits for anyone who could claim minimal service time on the northern side of the Civil War."³³ "Through Civil War benefits, the federal government . . . became the source of generous and honorable social provision for a major portion of the American citizenry."³⁴ This provision included

29. ROSS, *supra* note 24, at 2.

30. *Id.*; see also ROBERT JÜTTE, *POVERTY AND DEVIANCE IN EARLY MODERN EUROPE* 26-27 (1994) (stating that "[o]ften enough the numbers of the poor were increased by demobilized soldiers. . . . Sir Thomas More . . . in *Utopia* (1516) pointed out that in inter-war periods demobilized soldiers and redundant retainers 'were thus destitute of service [that they] either starve for hunger, or manfully play the thieves'") (quoting THOMAS MORE, *THE UTOPIA OF SIR THOMAS MORE* (J.H. Lupton ed., 1895) (1516)).

31. RICHARD SEVERO & LEWIS MILFORD, *THE WAGES OF WAR: WHEN AMERICA'S SOLDIERS CAME HOME—FROM VALLEY FORGE TO VIETNAM* 16 (1989).

32. *Id.*; see also DIXON WECTER, *WHEN JOHNNY COMES MARCHING HOME* 10, 183 (1944) (discussing contradictory views of veterans and stating that, after the Civil War, "stay-at-homes often nourished a secret distrust of the soldier"). The United States did, however, have a history of providing land to some of its veterans—those who were male and white. See, e.g., JAMES W. OBERLY, *SIXTY MILLION ACRES: AMERICAN VETERANS AND THE PUBLIC LANDS BEFORE THE CIVIL WAR* (1990); REPORT ON VETERANS' BENEFITS, *supra* note 6, at 67 (stating that the provision of compensation and pensions "was followed by land grants (changed after the Civil War to homestead preference)"); *id.* at 110-14 (discussing government aids to land acquisition by veterans).

33. SKOCPOL, *supra* note 7, at 102.

34. *Id.* at 101; see also *id.* at 111, 128-29; see also MICHAEL B. KATZ, *IN THE SHADOW OF THE*

housing. At the end of the nineteenth century, “the federal government accepted responsibility for sheltering citizen-veterans, both disabled and elderly, who were physically unable to maintain their livelihoods in the rough-and-tumble world of late-nineteenth-century capitalism.”³⁵ It did this by establishing a series of soldiers’ homes—collectively entitled the National Home for Disabled Volunteer Soldiers (NHDVS)—that offered “a generous and dignified space for citizen-veterans,” “a system of relatively comfortable, modern, and ornamented institutions providing Union veterans with food and board, medical care, recreation, religious instruction, and employment opportunities . . . without suffering from the stigma afflicting nonveterans forced to seek help from the local poorhouse.”³⁶ The residence was “not a charity,” but “a home tendered to the veteran . . . as a partial remission of a debt the government was obliged to pay directly to every volunteer who fought in the nation’s service.”³⁷

By the early 1870s, the United States had “a viable institution for the care of disabled veterans,” with four branches of the National Home and “an efficient system of outdoor relief” for disabled veterans who preferred private accommodations.³⁸ By 1900, there were eight branches of the NHDVS; when NHDVS was consolidated into the Veterans Administration (VA) in 1930, there were twelve.³⁹ While the Board of NHDVS also used state homes, it insisted

POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 200 (1986) (stating that “[i]n the late nineteenth and early twentieth centuries, at least one of every two elderly, native-born white Northern men and many of their widows received a pension from the federal government. Pensions were the largest expense in the federal budget after the national debt. Through its veterans’ pensions, the United States federal government . . . spent much more on old-age assistance than did Britain, which usually is thought to have been far in advance of America in the development of a welfare state”)

35. KELLY, *supra* note 5, at 129. A contrary view was reported, however, by the 1956 presidential commission chaired by General Omar Bradley, which said that “[f]or all wars prior to World War II, . . . veterans without service-connected disabilities were left to their own devices in the matter of their readjustment to civilian life.” REPORT ON VETERANS’ BENEFITS, *supra* note 6, at 51. This finding by the Bradley commission may be related to the commission’s recommendations. See JUNE A. WILLENZ, WOMEN VETERANS: AMERICA’S FORGOTTEN HEROINES 167 (1983) (stating that the Bradley commission “aroused great controversy [when] it questioned the rationale for many of the benefits, particularly for those who had not been wounded or maimed in battle. It concluded that the justification for non-service-connected benefits was quite weak, and that society had other methods at its disposal to meet the needs of veterans who were not wounded in war”).

36. KELLY, *supra* note 5, at 123.

37. Cetina, *supra* note 7, at 94-96.

38. *Id.* at 143; see *id.* at 3 (stating that in some cases, the soldiers’ homes (or “branches”) were residences for the dependents of elderly veterans as well as the veterans themselves); *id.* at 320 (discussing the Wisconsin home’s provision for married couples and widows).

39. KELLY, *supra* note 5, at 2 n.4. The Veterans Administration (VA) became the cabinet-level Department of Veterans Affairs (DVA) on March 15, 1989. Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635. Both the DVA and others often refer to the

“that it was not the state’s duty to care for the disabled soldier but that the obligation to assist the needy veteran was a general charge upon the whole country, and all sections of the nation should bear their fair share.”⁴⁰

The homes, distinguished in their architecture and landscaping, were “highly valued prizes for communities Requiring a steady supply of goods, labor, and services, each branch of this institution played a significant role in sustaining the economic vitality of nearby cities. . . . [L]ocal communities displayed an intense interest in procuring a branch of the National Home for their area.”⁴¹

The NHDVS housed “colored” as well as white veterans, all of whom initially were said to have lived “together on friendly terms, . . . without thought of each other except [as] soldiers disabled in the cause of a common country.”⁴² “[B]y the end of the century, [however,] Jim Crow had apparently destroyed any hopes for full integration. Members of the colored company . . . then messed at separate tables and patronized a special shop separate from the main barbershop.”⁴³

DVA as the VA; this Article does so as well.

40. Cetina, *supra* note 7, at 143; *see, e.g.*, STATE OF CALIFORNIA, GOVERNOR’S COMMISSION ON CALIFORNIA VETERANS HOMES: 1999-2001, FINDINGS AND RECOMMENDATIONS ON SITES FOR FUTURE STATE VETERANS HOMES 4-5 (Oct. 15, 2001) (noting that California’s first veterans’ home, in Yountville, has operated since 1884, and that additional homes were added, in the 1990s, in Barstow and Chula Vista).

41. KELLY, *supra* note 5, at 172.

42. Cetina, *supra* note 7, at 112 (quoting ANNUAL REPORT OF THE BOARD OF MANAGERS FOR 1871, H. Mis. Doc. 298, 42d Cong., 2d Sess., at 2); *see also* KELLY, *supra* note 5, at 98 (“In the decade of the 1870s, the Home housed approximately 80 black veterans a year.”). With respect to the situation of Blacks in the pension system, *see* SKOCPOL, *supra* note 7, at 138, stating that

[S]ome 186,017 blacks served in the Union armies Blacks made up about 9 to 10 percent of the Union forces Although there is no systematic evidence about how black Union veterans fared in the pension application process compared to whites, hints from the historical record suggest that free blacks with stable residential histories in the North probably did as well as their white socioeconomic counterparts, while black veterans and survivors from the ranks of freed slaves may often have lacked the documents they needed to establish claims for pensions. Remarkably unlike most U.S. institutions of its day, the Pension Bureau was not formally racist.

See also id. at 596 n.130 (noting that about 5 percent of the Pension Bureau’s employees in 1903 were black); *cf.* Ann Shola Orloff, *The Political Origins of America’s Belated Welfare State*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 22, at 37, 48 (stating that Blacks were excluded from the pension system) and Theda Skocpol & John Ikenberry, *The Political Formation of the American Welfare State in Historical and Comparative Perspective*, 6 COMP. SOC. RES. 87, 97-98 (1983) (same).

43. Cetina, *supra* note 7, at 112; *see also* KELLY, *supra* note 5, at 98-99, stating that

By the end of World War I, provisions for veterans plainly were inadequate. Many veterans, including those with disabilities, suffered severe want in the 1920s.⁴⁴ Wecter writes that, in the depression of 1920-21, “the Keys to the City had turned out to be only a pass to the flophouse” for some veterans.⁴⁵

Black residents, however, lived in segregated quarters, ate their meals at segregated tables, and had their hair cut by separate barbers. The number of African-Americans living in the home network remained small, especially in proportion to the number of African-American men who had served as Union soldiers By 1899, . . . only 2.5 percent (or 669) of the veterans assisted in the NHDVS were African-American.

See also *id.* at 225 n.33, stating that:

In addition to discrimination, there are other explanations for the disproportionately low number of blacks in the network. One is the traditional reluctance of African-Americans to institutionalize family members. In an agricultural economy, African-American kinship networks were possibly both more willing and more able to absorb and care for disabled family members.

The change in treatment of Black veterans is consistent with the thesis that universal segregation was not imposed in the South before 1887. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6, 16 (1957) (“More than a decade was to pass after Redemption before the first Jim Crow law was to appear upon the law books of a Southern state, and more than two decades before the older states of Virginia, North Carolina, and South Carolina were to adopt such laws.”).

44. See WECTER, *supra* note 32, at 363-64, stating that:

Many veterans now [in 1921] felt the pinch of want In Greater Boston, in the winter of 1920-21, six thousand veterans and their families sought Red Cross relief. . . . Panhandlers in faded uniforms and veterans selling apples and pencils and poppies stood on street corners, foreshadowing the even bleaker phenomena of ten years later.

See also RAYMOND MOLEY, JR., *THE AMERICAN LEGION STORY* 78-80 (1966) (indicating that even veterans who had been disabled in World War I were not adequately cared for after the war. Among other things, “[t]he mentally ill were housed in jails, and other patients were led to cots provided by [American] Legion posts”); *id.* at 111-113 (discussing the plight of disabled veterans); *id.* at 117 (stating that some of “the shattered of World War I [n]eglected and destitute, bedridden and diseased, . . . sought refuge in insane asylums, poorhouses and even jails [S]ome [including some with tuberculosis] were compelled to sleep in the open. These were hardly the rewards of a grateful nation”); *id.* at 279 (noting that there were “immediate hardships for most, prolonged displacement for some, and, when the waves of depression rolled across the country, a full measure of misery for hundreds of thousands who had served” and depicting “cold, hungry men in tattered khaki warming themselves in hobo camps along the nation’s railroads, the ex-serviceman selling apples on a street corner or sidling up to a soup kitchen in old shoes repaired with cardboard. The destitute veteran was a familiar sight for two decades between the wars”). These descriptions suggest that Kelly errs in stating that “[t]he creation of this system of veterans’ institutions . . . marked the permanent expansion of the U.S. veterans’ welfare state.” KELLY, *supra* note 5, at 90.

45. WECTER, *supra* note 32, at 345. But see *id.* at 403-04 (stating that “American pensioners of the World War [I] increased 866 percent between 1919 and 1929, whereas among the nations of Europe such pensioners were steadily diminishing” and attributing “these transatlantic

Beginning in 1929, with the Great Depression, the need and suffering of veterans increased dramatically. In May 1932, between 20,000 and 40,000 veterans—the Bonus Expeditionary Force (BEF)—arrived in Washington, D.C. to urge Congress to provide an immediate cash bonus for veterans.⁴⁶ In July 1932, Army Chief of Staff General Douglas MacArthur led 600 troops, including mounted cavalry and tanks, to drive the veterans out of their nation's capital.⁴⁷ What has been called “the grotesque spectacle of the rousting of ex-servicemen” contributed to the defeat of Herbert Hoover four months later.⁴⁸

B. New Deal Housing: The Federal Housing Administration and the Public Housing Program

The most important contemporary development with respect to veterans' housing—the G.I. Bill of Rights—emerged in the administration of Franklin Delano Roosevelt (FDR). In order to appreciate the significance of the G.I. Bill, it is necessary first to understand the general housing policies and programs of FDR's administration—the Federal Housing Administration (FHA) program of 1934 and the public housing program of 1937—and the background for those programs.

Except for military and veterans' accommodation, the United States government was not involved in providing housing assistance until World War I, and its involvement at that time was limited to assisting in financing the development of housing for shipbuilders and other defense workers.⁴⁹ As soon

differences” to three things: “the generosity of American traditions and our almost reckless gratitude toward the man who has shouldered a gun in the nation's defense”; “our lack of universal health, old age, and unemployment insurance”; and “our highly developed system of lobby and pressure groups, controlled by specialists skilled in amplifying a minority murmur into a roar imperious and terrifying to any Congressman”).

46. See ROSS, *supra* note 24, at 12-16 (discussing, *inter alia*, the removal of the Bonus Expeditionary Force from Washington, D.C. in 1932 and setting the number of BEF marchers at 20,000); cf. DONALD J. LISIO, *THE PRESIDENT AND PROTEST: HOOVER, MACARTHUR, AND THE BONUS RIOT* 77 (1994) (setting the number at 20,000); SEVERO & MILFORD, *supra* note 31, at 269 (setting the number between 25,000 and 40,000).

47. See SEVERO & MILFORD, *supra* note 31, at 274 (stating that President Hoover later said that he had intended only that the veterans be moved from the business district of Washington back to their encampment in Anacostia); *id.* at 275 (stating that the VA reported that 67% of the marchers had served overseas and 20% of them suffered some disability); LISIO, *supra* note 46, at x (MacArthur “deliberately disobeyed Hoover's written order limiting the scope of the Army's assistance, and he later ignored the President's repeated oral messages to stop all operations.”).

48. SEVERO & MILFORD, *supra* note 31, at 276 (calling this event a “grotesque spectacle”); *id.* at 278 (“Hoover's (really MacArthur's) folly cost Hoover the November election”); LISIO, *supra* note 46, at x (“The expulsion of the bonus marchers delivered an irreparable blow to Hoover's reputation, as most people assumed that he had ordered the brutal dispersal.”).

49. See GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* 16-17, 37-43 (1996); Steven E. Andrachek, *Housing in the United States: 1890-1929*,

as World War I ended, the government ordered that housing sold as swiftly as possible.⁵⁰

After the Great Depression, the homeownership rate in the United States, which had been low in the 1920s, became even lower, as millions of homeowners faced foreclosure.⁵¹ President Hoover and the Congress acted to protect homeowners from foreclosure and to encourage the expansion of homeownership, but their efforts were modest and relatively ineffective.⁵²

When Franklin Delano Roosevelt's administration began in 1933, he and Congress acted swiftly to expand efforts to protect and advance homeownership.

in *THE STORY OF HOUSING* 123, 169 (Gertrude Sipperly Fish ed., 1979) ("The role of the federal government in housing reform between 1890 and 1929 was almost nonexistent."); *id.* at 170-72 (discussing the three federal laws enacted in 1918 "to provide housing for laborers in the war-related industries"); Eric J. Karolak, "*No Idea of Doing Anything Wonderful*": *The Labor-Crisis Origins of National Housing Policy and the Reconstruction of the Working-Class Community, 1917-1919*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 60 (John F. Bauman et al. eds., 2000) [hereinafter *FROM TENEMENTS TO THE TAYLOR HOMES*]; *id.* at 64 ("The wartime production crisis, not the general welfare of urban workers and their families, justified the first federal home-building program.").

This was in sharp contrast to the situation in Great Britain, where, in 1918, Prime Minister Lloyd George famously "pledged himself to secure 'habitations fit for the heroes who have won the war.'" MARK SWENARTON, *HOMES FIT FOR HEROES: THE POLITICS AND ARCHITECTURE OF EARLY STATE HOUSING IN BRITAIN* 79 (1981) (quoting *THE TIMES*, 13 Nov. 1918). *See id.* at 67 ("In the wake of the Armistice, the 'homes fit for heroes' campaign was adopted as the major weapon of the state in the 'battle of opinion' on which, it was believed, the future of the entire social order depended."); *id.* at 1 (Thereafter, between World Wars I and II, "local authorities in England and Wales built about three-quarters of a million houses . . ." for returning veterans and their families.); *see also* LAURENCE F. ORBACH, *HOMES FOR HEROES: A STUDY OF THE EVOLUTION OF BRITISH PUBLIC HOUSING, 1915-1921* (1977).

50. *See* Karolak, *supra* note 49, at 74-75; Andrachek, *supra* note 49, at 172; Mary K. Nenno, *Housing in the Decade of the 1940's—The War and Postwar Periods Leave Their Marks*, in *THE STORY OF HOUSING*, *supra* note 49, at 242, 245, 247.

51. *See* GWENDOLYN WRIGHT, *BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA* 193 (1981) ("[T]he residential mortgage debt had tripled in one decade [1920s]; and the number of foreclosures mounted precipitously at the decade's end. In addition, the percentage of homeowners had been steadily declining. . . ."); *id.* at 195-96 ("The 1920 census showed that only 46 percent of all American families were homeowners. That figure was even lower in most metropolitan areas . . ."); *id.* at 205 ("After 1925, foreclosures began to increase."); NATHANIEL S. KEITH, *POLITICS AND THE HOUSING CRISIS SINCE 1930*, at 19 (1973) ("In 1932, foreclosures reached the disastrous level of 250,000 homes."); *id.* at 24 (In early 1933, "homes were being foreclosed at an average rate of about one thousand per day.").

52. *See* WRIGHT, *supra* note 51, at 196-200 (describing Herbert Hoover's encouragement of homebuilding before and during his presidency); Janet Hutchison, *Shaping Housing and Enhancing Consumption: Hoover's Interwar Housing Policy*, in *FROM TENEMENTS TO THE TAYLOR HOMES*, *supra* note 49, at 81, 93; RADFORD, *supra* note 49, at 86-88, 178; *REPORT ON VETERANS' BENEFITS*, *supra* note 6, at 42-43

To preserve homeownership, Roosevelt urged Congress to create the Home Owners Loan Corporation (HOLC), which “help[ed] to save 10 percent of all owner-occupied nonfarm residences” in its first year of operation.⁵³ To stimulate housing construction without large federal investment, Roosevelt proposed what became the National Housing Act of 1934, which created the Federal Housing Administration program of insuring home mortgage loans.⁵⁴ Mariner Eccles, who was a principal drafter of the legislation, explained that it “avoided any direct encroachment by the government on the domain of private business, but . . . used the power of government to establish the conditions under which private initiative could feed itself and multiply its own benefits.”⁵⁵ These efforts served both Roosevelt’s political goals and his personal support for homeownership.⁵⁶ Despite the program’s emphasis on the private market, the legislation initially was opposed by building and loan associations, and by many insurance companies and mutual savings banks.⁵⁷ The homebuilders and realtors, however, were powerful supporters of the program.⁵⁸

53. RADFORD, *supra* note 49, at 179; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 195-203 (1985) (describing the operations of the Home Owners Loan Corporation).

54. *See* JACKSON, *supra* note 53, at 203-18; RADFORD, *supra* note 49, at 179-80.

55. MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 151 (1951); *see also id.* at 150-51 (describing the “revolution[ary]” nature of the FHA proposals); *id.* at 152 (stating that the original FHA legislation also was intended to promote rental housing); *id.* at 303 (stating that the provision for rental assistance was not adequate); *id.* at 159-60 (stating that the original FHA legislation was effective for home repairs but not for new construction until amendments were made in 1938). For a different view, *see* DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN THE MODERN AMERICAN SUBURB (forthcoming 2005).

56. *See* RADFORD, *supra* note 49, at 179 (FDR expressed “both a cultural preference for homeownership and an intention to use it to maintain political equilibrium.”).

57. *See* ECCLES, *supra* note 55, at 155 (“[T]he building and loan associations were opposed to the FHA because they did not want to see commercial banks get into the home lending field” and many insurance companies and mutual savings banks also opposed the FHA.); *id.* at 159 (referring to “the almost solid opposition to the program offered by the financial community”).

58. *See, e.g.,* MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965, at 113 (1975) (“Nelson, who dominated the association [the National Association of Real Estate Boards (“NAREB”)] for three decades before his retirement in the mid-1950s,” gave “avid support” to the FHA mortgage insurance program, “which practically guaranteed a builder his profit,” but Nelson strongly opposed public housing.); KEITH, *supra* note 51, at 13 (“While the establishment of the FHA mortgage insurance program had some reform aspects from the standpoint of correcting the mortgage abuses of the Twenties, it was primarily sold politically as a program to unfreeze the home-building industry and thereby stimulate employment and the economy.”); *id.* at 25 (The “acutely depressed building materials and equipment industries and . . . the surviving remnants of the home builders” also supported this approach.); *see also* ECCLES, *supra* note 55, at 154-55 (“While the heart of the FHA involved a reform of the whole mortgage market, the character of the opposition that was encountered forced us to soft-pedal that

Meanwhile, federally subsidized rental housing was developed by the Public Works Administration's Housing Division.⁵⁹ This program was strongly opposed by the lending, insurance, and real estate industries and by conservatives generally.⁶⁰ Liberals of various persuasions tried to transform it into a permanent program, although FDR himself did not offer much support for the effort.⁶¹ As the ravages of the Depression and enthusiasm for the New Deal waned, conservatives in Congress were able to eviscerate these attempts. While Congress did create a federally-financed low rent public housing program in the United States Housing Act of 1937, the legislation had been substantially weakened, and the final bill was considered a victory for the new conservative coalition.⁶²

C. Veterans' Housing in the Administration of Franklin Roosevelt and the G.I. Bill of Rights

President Franklin Roosevelt shared with President Hoover the view that non-disabled veterans should be assisted only in their status as members of the general population.⁶³ Addressing the American Legion in 1933, FDR said "that no person, because he wore a uniform, must thereafter be placed in a special class of beneficiaries over and above all other citizens. The fact of wearing a uniform

theme. We were obliged instead to speak merely of the effect the proposed bill would have in stimulating new construction.").

59. See RADFORD, *supra* note 49, at 89-109.

60. See *id.* at 105. "Conservative," a word that recurs throughout this Article, generally refers to those who opposed most of the domestic programs of the New Deal. See JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL, at vii (1967) (citing CLINTON ROSSITER, CONSERVATISM IN AMERICA: THE THANKLESS PERSUASION 12-13, 165 (2d ed. 1962)).

61. See, e.g., H. PETER OBERLANDER & EVA NEWBRUN, HOUSER: THE LIFE AND WORK OF CATHERINE BAUER 130-44 (1999) (describing the different approaches of Catherine Bauer for the Labor Housing Conference and Mary Simkhovitch for the National Public Housing Conference); *id.* at 143 (stating that when the legislation was being considered in 1926, Catherine Bauer "told her union friends that 'the President could change the whole picture in thirty seconds if he would make a statement—even a lukewarm one.' But he remained silent"); TIMOTHY L. McDONNELL, THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS 214-15, 271-72, 342-45 (1957) (describing FDR's lack of enthusiasm for the legislation, although he ultimately did support its passage).

62. See RADFORD, *supra* note 49, at 189-191 (discussing defects in the legislation, which put siting and other crucial decisions under local and state control); PHILLIP J. FUNIGIELLO, THE CHALLENGE TO URBAN LIBERALISM: FEDERAL-CITY RELATIONS DURING WORLD WAR II, at xiv (1978) ("To some extent . . . the urban programs of the Roosevelt administration were a snare and delusion A matching grant toward construction was very tempting, but there was no similar federal grant for maintenance and upkeep."); PATTERSON, *supra* note 60, at 155 n.68 ("The final version [of the 1937 Housing Act] largely reflected the views of conservatives.").

63. See ROSS, *supra* note 24, at 24; 2 HERBERT HOOVER, MEMOIRS OF HERBERT HOOVER 285 (1951) (referring to "professional money-hunting veterans").

does not mean that he can demand and receive from his Government a benefit which no other citizen receives.”⁶⁴ FDR also attempted to prevent the redemption of the bonuses created by Congress in 1924.⁶⁵ Even with respect to disabled veterans, FDR “remove[ed] from pension rolls . . . the vast majority having nonservice-connected disabilities” and reduced compensation for veterans with service-connected disabilities.⁶⁶

Despite his earlier determination to serve non-disabled veterans only as part of the general public, when FDR was planning for reconstruction after the Second World War, he became disposed to offer some benefits to non-disabled veterans.⁶⁷ The President, his advisers, and the nation in general were very much concerned that demobilization and “[r]emoval of the war-created federal fiscal activity when peace came would lead to widespread unemployment.”⁶⁸ They did not want a recurrence of the Great Depression.⁶⁹

In a fireside chat in July 1943, FDR said that veterans “must not be demobilized into an environment of inflation and unemployment, to a place on the bread line or on a corner selling apples.”⁷⁰ When the public responded well to this suggestion, the Administration proposed legislation whose principal provision was for educational benefits for veterans.⁷¹ While FDR spoke of the

64. Franklin D. Roosevelt, Address to the American Legion Convention, Chicago, Ill. (Oct. 2, 1933), in 2 PUB. PAPERS, *supra* note 14, at 373, 375-76. See ROSS, *supra* note 24, at 18-19, 27, 33, 49-50 (discussing the conflict over this view); *id.* at 18 (quoting Treasury Secretary Morgenthau’s view that veterans, “a special-interest group,” “had no special claim on the government”).

65. See ROSS, *supra* note 24, at 17-19.

66. Amenta & Skocpol, *supra* note 22, at 85-86 (While the New Dealers generally sought to expand social welfare programs, they “attempted to cut back one category of social expenditures: benefits for military veterans. They believed that the needs of ex-soldiers should be met chiefly by programs directed at the entire population.”); see also ROSS, *supra* note 24, at 25-28 (describing Roosevelt’s initially successful fight for legislation that enabled him to accomplish these reductions by executive order); *id.* at 78-82 (discussing the 1943-44 attack, led by the American Legion and the Hearst newspapers, against the Administration’s alleged neglect of disabled veterans).

67. See OLSON, *supra* note 5, at 19-20 (discussing the change in Roosevelt’s views).

68. ROSS, *supra* note 24, at 34; see also MOLEY, *supra* note 44, at 279 (stating that more people were seeking work at the end of the war than had been unemployed in 1933: “[t]ens of millions in war work sought peacetime jobs. Compare this with the great depression when eleven million were unemployed in 1933, less than the total World War II demobilization”). But cf. KERTH, *supra* note 51, at 22 (“By early 1933, unemployment was estimated variously at from 12 million to 17 million persons . . . (there were no accurate statistics).”).

69. See ROSS, *supra* note 24, at 34-36 (discussing the “Depression Psychosis”); *id.* at 56-58 (discussing proposals to keep servicemen in service after the war ended in order to avoid demobilizing them into unemployment).

70. Franklin D. Roosevelt, Fireside Chat on Progress of War and Plans for Peace (July 28, 1943), in 12 PUB. PAPERS, *supra* note 14, at 326, 333; ROSS, *supra* note 24, at 64.

71. Franklin D. Roosevelt, Message to Congress on the Education of War Veterans (Oct. 27, 1943), in 12 PUB. PAPERS, *supra* note 14, at 449, 451 [hereinafter Roosevelt, Message to Congress

moral obligation to provide for veterans, he emphasized that education would “simplify and cushion the return to civilian employment of service personnel.”⁷² The remaining elements of FDR’s proposals—mustering-out pay, a uniform system of federal unemployment benefits, and credit for social security for the time spent in the service—also were designed to soften the impact of demobilization on the labor market.⁷³

While housing was not part of the President’s proposals for veterans,⁷⁴ FDR and his administration did consider that the federal government should provide some forms of housing assistance—for the public in general, not veterans in particular.⁷⁵ Indeed, the National Housing Administrator “advised against a

on the Education of War Veterans]; ROSS, *supra* note 24, at 82, 89, 92.

72. Roosevelt, Message to Congress on the Education of War Veterans, *supra* note 71, at 450 (“[T]he Nation is morally obligated to provide this training and education.”); ROSS, *supra* note 24, at 92-93; *see also id.* at 61-62 (noting that these points had been made in the report of the National Resources Planning Board (NRPB) and that the planners also “believed that aid to veterans would strengthen the nation’s schools and colleges”).

For a description of the volatility of the situation in the United States, *see* MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA* 8-17 (1996); *id.* at 17 (“‘After the last war, except for England, this is the only country where the men who wore uniforms did not overthrow the government on either side of the conflict,’ Henry Colmery, the American Legion national commander who wrote the G.I. Bill, had warned Congress when the bill was under consideration.”) (quoting OLSON, *supra* note 5, at 20); BENNETT, *supra*, at 17 (“If the twelve million veterans of World War II had been dumped off the boats like the nearly four million from the previous war and given only \$60 and a train ticket home with neither educational nor economic opportunity waiting when they got back, violent revolution might have easily been sparked.”); OLSON, *supra* note 5, at 4 (“The sheer numbers of future veterans frightened Americans. Leaders across the country influenced others to believe that something had to be done for the veterans—something beyond a bonus, something that would contribute significantly to a healthy economy, and something that would allay veteran resentment toward government.”).

73. *See* ROSS, *supra* note 24, at 93.

74. *See id.* at 89-94 (describing elements of the Administration’s proposals, which did not include housing, and revealing that the housing agencies were not represented in the interagency committee established by the Budget Bureau to develop the proposals); *id.* at 55 & n.73 (showing that the Housing and Home Finance Agency had not been represented in the Post-War Manpower Conference that met regularly during 1942 and early 1943); *id.* at 52-61; *id.* at 62 (noting, however, that the National Resources Planning Board had recommended “disposal of [farm] lands acquired by the Federal Government during the war to deserving and apt veterans”).

75. Part of the influence on the Administration with respect to housing programs came from the National Resources Planning Board (NRPB), chaired by FDR’s uncle, Frederic Delano, and charged by FDR in November 1940 to develop “national social and economic policies for the postwar period.” Amenta & Skocpol, *supra* note 22, at 87; *see* FUNIGIELLO, *supra* note 62, at 164 (regarding “post-defense planning”); ROSS, *supra* note 24, at 52-53 (referring to the work of the NRPB’s Post-War Manpower Conference as “the single most important effort on the part of the executive department to provide a comprehensive policy for World War II veterans”). With respect to housing, “the NRPB had a radical viewpoint. The ‘right to shelter’ was included in its 1942 New

special program just to meet the postwar needs of veterans alone. He thought a broad policy benefitting all citizens would be more desirable"⁷⁶ and expressed concern that a special program for veterans might "obstruct or complicate"⁷⁷ more general programs.⁷⁸

The source of what became the veterans' housing program was omnibus veterans' legislation proposed by the American Legion, legislation that quickly came to be known as the G.I. Bill of Rights.⁷⁹ In addition to more customary forms of veterans' benefits, the Legion's proposed G.I. Bill also included a relatively new idea, a housing provision that would have had states administer programs for making loans to finance homes and farms, with the federal government providing \$4 for each \$1 contributed by the state.⁸⁰

The G.I. Bill was introduced on January 10, 1944, by Senator J. Bennett ("Champ") Clark (D-Mo.) and Congressman John E. Rankin (D-Miss.).⁸¹ In the Senate, the bill had 70 co-sponsors. After some amendments, it was approved unanimously by that body on March 24, 1944.⁸²

The bill's progress in the House was considerably slower. The bill was referred to the House Committee on World War Veterans' Legislation, chaired

Bill of Rights, which President Roosevelt cited in his 1944 reelection campaign." Amenta & Skocpol, *supra* note 22, at 92.

The NRPB was not able to implement any of its recommendations that conflicted with "VA-supported programs for veterans . . . [I]n matters such as health insurance and disability programs, the jealous control maintained by the VA over national programs for veterans prevented the NRPB from realizing its vision of national programs for all citizens." *Id.* at 108.

The NRPB was eliminated in 1943 on the urging of "[c]ongressional critics of planning and the New Deal, fiscal conservatives, rural Democrats and Republicans, and interest groups such as the National Association of Real Estate Boards." FUNIGIELLO, *supra* note 62, at 184.

See also ROSS, *supra* note 24, at 92 (noting that although the recommendations for educational benefits for veterans had originated with the NRPB's Post-War Manpower Conference, FDR, in an act of apparent "administrative 'genius,'" attributed the recommendations to his Armed Forces Committee on Post-War Educational Opportunities for Service Personnel, rather than to the controversial NRPB).

76. ROSS, *supra* note 24, at 72-73.

77. *Id.* at 244.

78. *Id.* at 102 ("The hope of linking veterans' benefits with the overall task of domestic reconversion had been a polestar for Roosevelt's planners.").

79. See *id.* at 99-102; MOLEY, *supra* note 44, at 270 ("The broad concept [of the GI Bill] originated in The American Legion, a member of the Legion wrote the bill, an employee of the Legion suggested its meaningful name, Legionnaires promoted it and handled its legal presentation, and a former Commander secured its unanimous approval in the Senate."); OLSON, *supra* note 5, at 18-20 (discussing the Legion's role).

80. See ROSS, *supra* note 24, at 101-02.

81. *Id.* at 98, 100.

82. *Id.* at 106. The vote was 50-0, with forty-six members absent, all of whom would have voted for the bill. *Id.*

by Congressman Rankin.⁸³ Chairman Rankin and members of his committee were not enthusiastic about the legislation.⁸⁴ After some delay, they offered a new version of the bill.⁸⁵ While the committee's focus was not on the housing provisions, its version did change the direct loans to guaranteed loans, and raised the maximum interest rate from three percent to six percent. The shift from direct to guaranteed loans "represented the successful efforts of Rankin to keep the Federal Government participation at a minimum."⁸⁶

The House as a whole had to decide whether to approve the committee's version or the Senate version, which was "generally favored by the Administration."⁸⁷ Rankin's committee's version, with some amendments, passed the House unanimously.⁸⁸ An attempt to reduce the interest rate from six percent failed.⁸⁹ In the House-Senate conference, the guaranteed loan provision was retained and the maximum interest rate was reduced from six to four percent.⁹⁰ President Roosevelt signed the bill into law on June 22, 1944.⁹¹ As Ross writes, "the elimination of direct loans to veterans" was one of "the fees extracted by conservatives in Congress."⁹² The enactment of a housing program that benefited only veterans was regarded as a defeat by those New Dealers who had tried to provide a universal program.⁹³

Few loans were made under the 1944 provisions, which a later study attributed to the facts that the maximum loan guarantee allowed was \$2000 "and that the careful doublecheck required by law for each applicant was too cumbersome."⁹⁴ In 1945, Congress amended the Act to raise the maximum guarantee to \$4000, streamline the loan process, and extend the deadline for

83. *See id.* at 21, 107.

84. *See id.* at 107-11; *id.* at 21-24 (providing a brief biography of Congressman Rankin).

85. *See id.* at 110-11.

86. *Id.* at 111 n.69.

87. *Id.* at 111.

88. *Id.* at 116. The vote was 388-0, with forty-one not voting. *Id.*

89. *Id.* at 115.

90. *Id.* at 118. The principal issues at conference concerned the unemployment and readjustment sections; dispute over these occasioned a dramatic conclusion to the conference, with the American Legion locating and returning to Washington the congressman whose vote made the crucial difference. *See id.* at 117.

91. *See supra* note 20; *see* ROSS, *supra* note 24, at 118.

92. ROSS, *supra* note 24, at 124; *see also* John Robert Moore, *The Conservative Coalition in the United States Senate, 1942-1945*, 33 J. S. HIST. 368, 373 (1967) (The year 1944 was "when the coalition [of conservative Southern Democrats and conservative Republicans] reached its peak strength.").

93. *See* PERRETT, *supra* note 22, at 339 ("A handful of New Dealers fought against the principle of veterans' exclusiveness, without the support of the White House. The Legion was therefore under no serious pressure to compromise, and its bill passed almost intact. Liberals mourned it as a great opportunity lost.").

94. REPORT ON VETERANS' BENEFITS, *supra* note 6, at 58.

securing loans.⁹⁵ The program became even more attractive to private lenders in “1950—when Congress increased the amount of the guarantee to 60 percent, or \$7,500, whichever was less, and the maximum maturity was increased to 30 years.”⁹⁶ In the decades of the 1950s and 1960s, the VA homeownership program was used by millions of veterans.⁹⁷

The housing program in the G.I. Bill was very similar to the Federal Housing Administration homeownership program created in 1934.⁹⁸ This is not surprising, as the American Legion had developed the G.I. Bill’s housing provisions in consultation “with real estate, building and loan and financial associations and the FHA.”⁹⁹

Both the VA and FHA programs helped the lending and real estate industries by encouraging the financing and construction of single family housing and assuring the lenders and builders that a federal agency would make up losses caused by borrower defaults.¹⁰⁰ Both the VA and FHA programs minimized the federal contribution. Both used private lenders to make the loans and limited the federal role to guaranteeing or insuring the lender against loss in case the borrower defaulted.¹⁰¹ The fundamental difference between the VA and FHA programs was that the veterans’ program was run by the Veterans’ Administration rather than by FHA.

95. See *id.* at 58-59; *id.* at 162-63 (stating that the “provisions . . . practically meant a fresh start because they changed the law to such an extent”).

96. Nenno, *supra* note 50, at 253; see also *id.* at 254 (stating that “until 1950, about two thirds of all VA loans were used for existing housing”); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. 91-34, at 103 (1969) [hereinafter THE DOUGLAS COMM’N REPORT] (same); see also PAUL F. WENDT, HOUSING POLICY—THE SEARCH FOR SOLUTIONS 180-81 (1963) (Until October 1950, the VA also guaranteed “Section 505 second mortgage loans which were also secured by” a FHA first mortgage. This “permitted 100-percent government-underwritten financing on the sale of new tract homes to eligible veteran borrowers.”).

97. See MOLEY, *supra* note 44, at 282 (“Of 5,268,000 loans made up to 1964, 4,966,000 were for homes. One-fifth of all single-family residences built since the end of World War II has been financed by the GI program for either World War II or Korean War veterans. Of the twenty-eight million home-owner properties . . . in the United States [before the date of publication of this book, 1966], 16,000,000 are mortgaged properties and about 22 per cent are financed by GI loans. . . . It has been said that the landscape architect of post-war America has been the VA loan-guarantee officer.”).

98. See JACKSON, *supra* note 53, at 204; LEVITAN & ZICKLER, *supra* note 23, at 85 (noting two significant advantages of the VA program).

99. MOLEY, *supra* note 44, at 273.

100. See WENDT, *supra* note 96, at 152 (“The FHA . . . was looked upon as an instrumentality of government designed to serve the private mortgage lenders.”)

101. See HENRY J. AARON, SHELTER AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES? 80, 87 (1972).

D. The Veterans' Emergency Housing Program and the Wagner-Ellender-Taft Bill: 1945-1949

When the G.I. Bill was enacted, the United States was facing a severe housing shortage.¹⁰² Millions of civilians were living in overcrowded and otherwise substandard conditions, and that situation soon would be exacerbated by the demobilization of millions of servicepeople.¹⁰³ Policymakers knew that rental housing as well as homeownership was needed.¹⁰⁴ A housing report published by the National Resources Planning Board in 1940 noted the need for housing for "the lower income groups," and said that "this new housing must provide houses for both owner occupancy and rental."¹⁰⁵ The report continued:

A large percentage of people now live in rented houses and apartments and will probably continue to do so.

Home ownership for everyone is not a feasible objective. Under many circumstances, home ownership is more costly than renting, and the risks are great. Under existing conditions, there are the dangers to be faced of property and neighborhood deterioration, of buying a poorly built house, of being unable to meet the long-time obligations involved. Moreover, there are people who prefer, or whose circumstances make it advisable for them, to rent rather than to own their living quarters. There are those whose present financial position is good but whose future is not assured, those who have been unable or do not wish to save, those who wish to invest their savings in other ways, those whose place of employment is likely to change, those whose occupation demands

102. See, e.g., RICHARD O. DAVIES, *HOUSING REFORM DURING THE TRUMAN ADMINISTRATION* 40 (1966); NAT ROGG, *OFFICE OF THE HOUSING EXPEDITER, A HISTORY OF THE VETERANS EMERGENCY HOUSING PROGRAM* 6-7 (n.d.) ("a housing shortage of unparalleled magnitude").

103. See Nenno, *supra* note 50, at 255 (In 1946, the Housing Expediter reported to the President that "[i]n October, 1945, 1.2 million families were living doubled-up with other families; an additional 2.9 million married veterans would need homes by December 1945; more than half a million nonveterans who would marry during the course of the year would be looking for homes. In total, 3.5 million families would be looking for homes in 1946, and about 1.1 million new families would need homes in 1947. To accommodate this need, only 945,000 vacant units would be available in 1946, and 430,000 vacant units in 1947. Thus, by the end of 1946, more than 2.5 million families would need homes.").

104. See, e.g., ROGG, *supra* note 102, at 32 ("Surveys of veterans' home preferences made in 1945 and 1946 indicated at least half of those seeking homes preferred to rent rather than to buy at current prices.").

105. NATIONAL RESOURCES PLANNING BOARD, *HOUSING, THE CONTINUING PROBLEM* 3 (1940) [hereinafter *THE CONTINUING PROBLEM*]; see also MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD* 132 (1981) (noting that the NRPB disclaimed responsibility for the views expressed in that report); Amenta & Skocpol, *supra* note 22, at 92 n.32 ("In 1940, the NRPB contracted for and published a report entitled *Housing: The Continuing Problem*, but it did not endorse any of its conclusions."); see CLAWSON, *supra*, at 94-97 (discussing the controversial nature of the NRPB).

frequent absences from home or a central urban location, those who are old and who do not wish the responsibility of a home of their own, and those who are young and need only small quarters. For all these people rental housing must be provided.¹⁰⁶

The Truman Administration recognized that the VA housing program was limited not just to veterans but to only those veterans who could afford and secure homeownership. Knowing that millions of veterans and nonveterans would be unable to use the VA housing program, the Administration "responded . . . with a twofold program," seeking enactment of both the Veterans' Emergency Housing Program (VEHP) and the Wagner-Ellender-Taft (W-E-T) bills.¹⁰⁷

1. *VEHP*.—On January 26, 1946, President Truman, by executive order, established the office of Housing Expediter, responsible for providing housing for veterans, and appointed Wilson W. Wyatt to that position.¹⁰⁸ In February 1946, Wyatt announced the Veterans' Emergency Housing Program, proposed legislation that was designed to "facilitate rapid construction of low-cost housing for veterans."¹⁰⁹ Wyatt based his VEHP proposals on continuation of wartime controls on rents, building materials, and new homes, and establishment of price ceilings on sales of existing houses and building lots.¹¹⁰ He also sought the establishment of "allocations and priorities for residential builders in purchasing materials and equipment, subject to a stiff preference for veterans in the sale or rental of the resulting housing,"¹¹¹ "premium payments" to encourage high-volume production of scarce building materials, and Reconstruction Finance Corporation loans" for factory-built housing.¹¹²

Aspects of the VEHP bill were powerfully opposed by the "real estate" lobby."¹¹³ The legislation was enacted only with restrictions and was signed into

106. THE CONTINUING PROBLEM, *supra* note 105, at 3. In 1981, Marion Clawson wrote that "all housing planners today should be required to read the 1940 report in full." CLAWSON, *supra* note 105, at 133. His observation is as true in 2005 as it was in 1981.

107. See DAVIES, *supra* note 102, at 41.

108. KEITH, *supra* note 51, at 59.

109. DAVIES, *supra* note 102, at 41-42.

110. KEITH, *supra* note 51, at 60.

111. *Id.*

112. DAVIES, *supra* note 102, at 44-45.

113. ROSS, *supra* note 24, at 256; *id.* at 255-56 ("The Democratic leadership complained about the immense pressure being put on Congress by the 'real estate' lobby," certainly including the National Association of Real Estate Boards (NAREB), which conducted a campaign to defeat it. Herbert U. Nelson, speaking for NAREB, urged all Realtors to contact their Congresspersons urging defeat of the Patman bill (which included some but not all of the VEHP proposals.); see *id.* at 256 n.69 ("Act now if you want to save your business," he advised them.). Although Ross identifies Nelson as NAREB Executive Director, Gelfand says Nelson was executive vice-president. See GELFAND, *supra* note 58, at 112.

law by President Truman on May 22, 1946.¹¹⁴ But subsequent actions by the conservatives in Congress “dealt the VEHP a telling blow,”¹¹⁵ and “on January 11, 1947, the President signed an executive order terminating most aspects of the program.”¹¹⁶

Part of the VEHP legislation had redirected a program of rental assistance from “war workers” to “veterans.”¹¹⁷ Under this “Section 608” program, more than 400,000 units of housing were built between 1946 and 1950, when the program ended.¹¹⁸ Thus, the VEHP did make a short-term contribution to meeting the veterans’ need for rental assistance, but relatively few rental units were produced,¹¹⁹ and both the “houses and apartments produced were primarily priced at levels suitable only for middle-income and at best lower-middle-income veterans. There was no production for low-income veterans or other families requiring housing subsidy for the simple reason that there was no financing program to accomplish this result.”¹²⁰

2. *The Housing Act of 1949.*—The Truman Administration’s other effort to provide rental housing assistance to veterans—and civilians—was resurrection of the public housing program created by the Housing Act of 1937.¹²¹ NAREB and other conservative forces had persuaded Congress to deny funding for public housing in 1939 and 1940;¹²² and conservative opposition to public housing

114. See DAVIES, *supra* note 102, at 46; KEITH, *supra* note 51, at 62 (“minus only the price ceilings on existing housing”); *id.* at 68 (noting that VEHP passed only with significant restrictions, and the program lasted for one year).

115. DAVIES, *supra* note 102, at 47.

116. KEITH, *supra* note 51, at 67.

117. See IRVING WELFELD, HUD SCANDALS: HOWLING HEADLINES AND SILENT FIASCOS 6 (1992) (Section 608 of the National Housing Act was enacted in 1942 (56 Stat. 303) and amended in 1945 (59 Stat. 47) and 1946 (Veterans’ Emergency Housing Act, Pub. L. 79-388, 60 Stat. 207, 214)).

118. See THE ENCYCLOPEDIA OF HOUSING, *supra* note 9 (“Between 1942 and the termination of the program in 1950, 465,683 units in more than 7,045 developments were built”); WELFELD, *supra* note 117, at 6 (stating that most of these were produced after 1946—over 425,000 units in a grand total of 7065 projects).

119. See ROGG, *supra* note 102, at 32-36 (discussing rental housing under the VEHP); *id.* at 36 (concluding that “the volume of rental housing started during 1946 and 1947 is still far short of meeting the need for this type of housing”).

120. KEITH, *supra* note 51, at 64; see also United Negro and Allied Veterans of America Representative, Report to the National Veterans Housing Conference 2 (Feb. 29, 1948) (John F. Kennedy Library, Papers of John F. Kennedy, Correspondence Series, National Veterans Conference, 1948 File, Box 83) [hereinafter United Negro & Allied Veterans] (citing Housing and Home Finance Agency surveys that showed that the median monthly rent of units authorized under the VEHP in 1946 was \$59, “compared to the \$39 median rent which Northern Negro veterans were able to pay and the \$31 median rent which Southern Negro veterans could pay”).

121. See *supra* note 62 and accompanying text.

122. See GELFAND, *supra* note 58, at 115 (“Joining forces with other conservative groups seeking to undo the New Deal’s welfare reforms, NAREB succeeded in convincing the House of

“virtually halt[ed] the program from 1939 to 1949.”¹²³

While public housing was under attack in the early 1940s, cities and real estate developers were promoting discussion of and plans for urban redevelopment, including the elimination of “slums and other deteriorated areas.”¹²⁴ While the interests of the cities and developers were quite different from the interests of the advocates for public housing, the two topics often were merged.

In January 1945, the Senate Subcommittee on Housing and Urban Redevelopment, chaired by Senator Robert A. Taft (R-Ohio), began serious hearings on these topics.¹²⁵ The public housing movement at this time had increasing strength. “The war emergency had given the reformers new opportunities to push for government construction. . . .”¹²⁶ The administration wanted to expand the public housing program: the National Housing Agency (NHA) Administrator, John B. Blandford, Jr., expressed the administration’s support for resuming the public housing program and “made it quite clear that he was adopting the public housers’ approach to city rebuilding.”¹²⁷

On August 1, 1945, Senator Taft submitted his subcommittee’s report, noting that the only “‘accepted national interest’ was in improving housing conditions.”¹²⁸ On the same day, Senator Robert F. Wagner (D-N.Y.), “the Senate’s dean of housing,” introduced legislation, co-sponsored by Senator Allen J. Ellender (D-La.),¹²⁹ that included both revived public housing and aid to

Representatives to kill USHA’s [United States Housing Authority’s] request for additional authorizations in 1939 . . . [and] further appeals for more public housing funds were similarly denied in 1940”); *see also* Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL’Y DEBATE 299, 303 (2000) (“[T]he growing number of anti-New Deal politicians elected to Congress in between 1938 and 1942 cut off funding for the public housing program.”); *id.* at 304 (“During the late 1930s, NAREB campaigned intensively against public housing and helped convince a conservative Congress to stop funding the program.”).

123. GELFAND, *supra* note 58, at 199; *see also* FUNIGIELLO, *supra* note 62, at 84 (“[T]he growing scarcity of building materials and labor in 1940 had virtually halted the slum clearance and public housing” programs.). In the conflict between defense housing and public housing, administration officials were willing to write off the USHA and the slum clearance program in exchange for votes on other legislation. In Congress, fiscal conservatives like Senator Harry F. Byrd of Virginia, anti-New Deal Democrats, and Republicans from rural constituencies . . . intended to make certain that public housing would not emerge after the war to compete with private enterprise.

Id. at 87-88; *id.* at 95-96 (In early 1941, Congress “went to considerable lengths to manifest displeasure toward the USHA and the public housing lobby.”).

124. *See* GELFAND, *supra* note 58, at 137-38.

125. *See id.* at 138 (“hearings began in earnest in January 1945”).

126. *Id.* at 140.

127. *Id.* at 138.

128. *Id.* at 142.

129. J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN

redevelopment.¹³⁰ These bills then were combined in the Wagner-Ellender-Taft (W-E-T) housing bill, introduced later in 1945.¹³¹ President Truman and Wilson W. Wyatt, the Housing Expediter, well aware that neither the G.I. Bill nor the VEHP met the need to provide housing assistance for lower-income veterans, saw the solution to this problem in enactment of the WET bill.¹³²

However, the public housing provisions of WET had many opponents, notably the real estate and lending industries and conservatives generally. The industries that benefitted from homeownership had a pragmatic interest in preventing the enactment of rental programs, since the lack of rental opportunities drove people to homeownership, whether they would have preferred that or not.¹³³ “[T]he Home Building Industry Committee, the National Association of Real Estate Boards, the National Association of Home Builders, and the United States Chamber of Commerce, among others,” were determined to kill the public housing feature of the bill.¹³⁴

LIBERALISM 240, 299-301 (1968).

130. See GELFAND, *supra* note 58, at 144.

131. *Id.* at 144-45.

132. See DAVIES, *supra* note 102, at 42 (Truman “endorsed and actively supported” WET.); *id.* at 49 (Wyatt believed WET would “fill in the gaps in the Veterans’ Emergency Housing Program.”).

133. See FUNIGIELLO, *supra* note 62, at 101 (“[E]ven low-income workers, unable to rent, were being pressured into ownership, usually with a \$100 down payment and the balance of the equity in eighteen monthly installments . . . [which] . . . only a few defense workers could afford to pay. . . .”); WELFELD, *supra* note 117, at 16-17 (Senator Robert Taft, in 1946, noted the relative dearth of rental housing opportunities and the more ample “building of housing for sale, the sale of which is forced on many veterans who should not have to buy them, and who would prefer to live in rental housing.”); *id.* at 17 (Taft’s comment was made with respect to the extension of Section 608 to veterans; he noted that the program is “perhaps somewhat too liberal for builders, but under that [there is] some building of rental housing rather than the building of housing for sale.”); see also MICHAEL HARLOE, *THE PEOPLE’S HOME?: SOCIAL RENTED HOUSING IN EUROPE & AMERICA* 209 n.10 (1998) (“Bowley . . . saw this development [of increasing homeownership in the 1930s] as driven by a lack of investment in rental housing, which led many to home ownership ‘because it was the only way of satisfying a particular need.’”) (quoting MARIAN BOWLEY, *HOUSING AND THE STATE* 1919-44, at 86 (1944)); see also JIM KEMENY, *THE GREAT AUSTRALIAN NIGHTMARE* 57 (1983) (stating that “[l]ower real rents increasingly deter households whose incomes have risen from buying into owner-occupation. . . . The danger [in Australia] in the mid-1970s was that public renting would increasingly be recognised as a cheap and attractive alternative to homeownership”).

134. See HUTHMACHER, *supra* note 129, at 323; GELFAND, *supra* note 58, at 144-47 (discussing WET and listing also the National Association of Manufacturers as an opponent).

Lined up on one side were NAREB, the United States Savings and Loan League, the American Bankers Association, and other business groups, each of which would have liked to get urban redevelopment started, but not at the price of more public housing. . . . Ranged against them were the liberal-welfare groups, many veterans organizations, the big-city mayors, and the Executive Branch.

In addition to the homebuilding and lending industries' financial interest in opposing rental housing, many industry actors were opposed to federal assistance to rental housing on ideological grounds. Industry spokesmen referred to public housing as "European socialism in its most insidious form" and "the cutting edge of the Communist front."¹³⁵ Indeed, WET's low-rent public housing provisions were "a *bête noire* for many conservatives of both political parties," who opposed public housing on ideological and financial grounds.¹³⁶ Among the opponents of the legislation was the American Legion, whose National Convention overrode some American Legion state departments' support for the legislation.¹³⁷

GELFAND, *supra* note 58, at 147 (footnote omitted); *see also* ROSS, *supra* note 24, at 269-70 (The national commander of AmVets wrote to President Truman complaining about "the real estate lobby, many of whose members seem to be primarily interested in constructing conventional houses, by handcraft methods at high prices."); DAVIES, *supra* note 102, at 68 (Senator Robert Wagner said: "Domestic treason is being perpetrated on the American Veteran and their fellow citizens by the money-mad real estate lobby and their unholy representatives in Congress.").

135. DAVIES, *supra* note 102, at 18.

136. ROSS, *supra* note 24, at 252; *see also* HUTHMACHER, *supra* note 129, at 301 (on opposition to public housing); von Hoffman, *supra* note 122, at 304 (The leaders of NAREB, including Herbert U. Nelson, "abhorred public housing on ideological grounds."); FUNIGIELLO, *supra* note 62, at 227 (stating that "the anti-New Deal, anti-public housing venom spewed forth across the pages of the *National Real Estate Journal*"); *id.* at 228 (The Urban Land Institute "had cooperated with the Association of Housing Builders [sic] in successfully lobbying Congress to refuse appropriations for public housing beyond what was needed to shelter defense workers."); *id.* at 224 ("In August 1943, the editor of the *National Real Estate Journal* warned fellow realtors that the fight 'against the ideologies of the public housers is not yet over, and may not be over for a long time to come.'"); *id.* at 104 (outlining the National Association of Home Builders' attack on public housing).

137. *See* Letter from Wm. L. Windsor, Department Commander (Pennsylvania), to Paul R. McCauley, National Veterans Housing (Jan. 28, 1948) (John F. Kennedy Library, Papers of John F. Kennedy, Correspondence Series, National Veterans Housing Conference, 1948 File, Box 82) (reciting position of American Legion); Letter from David I. Shapiro, to Paul R. McCauley (Dec. 12, 1947), appended to Letter from Paul R. McCauley, Executive Director, Housing Authority of Kansas City, to John Kennedy, House of Representatives (Dec. 16, 1947) (John F. Kennedy Library, Papers of John F. Kennedy, Correspondence Series, National Veterans Housing Conference, 1948 File, Box 82) (Shapiro writes that his Kings County (N.Y.) delegation "was the only delegation that" supported the T-E-W bill. "The pressure placed by national on the department leadership was horrible to witness. The 'big boys' must certainly have an important stake in the defeat of the Bill."); Letter from W.B. Stone, National Executive Committeeman, The American Legion, Department of Missouri, to Paul R. McCauley, Executive Director, Housing Authority of Kansas City (Feb. 11, 1948) (John F. Kennedy Library, Papers of John F. Kennedy, Correspondence Series, National Veterans Housing Conference, 1948 File, Box 82) (objecting, because of the American Legion's opposition to the Taft-Ellender-Wagner Bill, to McCauley's participation as an organizer of the National Veterans Housing Conference, which supported the bill; Stone expresses the hope "that no voice, represented as an official spokesman of the American

When the Republicans won control of Congress in 1946, the bill was renamed the Taft-Ellender-Wagner (T-E-W) Act.¹³⁸ Despite its bipartisan support, the legislation was unsuccessful in 1946 and 1947.¹³⁹ It passed in the Senate, but failed in the House, largely because of the opposition of Jesse Wolcott, chair of the House Banking and Currency Committee, a conservative “who was strongly opposed to public housing.”¹⁴⁰

“Housing was a major issue in the 1948 presidential and congressional races”¹⁴¹ That election produced both the surprising victory of President Truman over Governor Thomas E. Dewey and a Democratic Congress, “but the party’s center of gravity had shifted to the right. Truman could not count on members of his own party to unite behind his agenda.”¹⁴² The Senate “had been

Legion, will be recorded at the proposed conference as favorable to the Taft-Ellender-Wagner Bill”); Letter from Paul R. McCauley, Executive Director, Housing Authority of Kansas City, to William B. Stone, National Executive Committeeman, The American Legion, Department of Missouri (Feb. 12, 1948) (John F. Kennedy Library, Papers of John F. Kennedy, Correspondence Series, National Veterans Housing Conference, 1948 File, Box 82) (noting that seven state departments of the American Legion had supported the T-E-W bill).

138. See DAVIES, *supra* note 102, at 61 (“the names were now reversed in deference to Taft’s majority leadership”).

139. See von Hoffman, *supra* note 122, at 308; HARLOE, *supra* note 133, at 270 (A principal opponent of public housing in the Senate was Senator Joseph McCarthy, who “received financial support from William Leavitt [sic; Levitt], one of the most prominent suburban speculative builders of the post-war period.”); DAVIES, *supra* note 102, at 68-72; *id.* at 68 (“The brash young Senator had hit upon housing as the best issue by which he could quickly gain national prominence for himself.”); *id.* at 69 (“McCarthy worked hard to find a way to end public housing. He frequently belabored witnesses with his idea of providing state-controlled cash subsidies to low-income families as a substitute for public housing”)—an idea, as Harloe points out, that the Nixon Administration favored, see HARLOE, *supra* note 133, at 362 n.22, and Congress later adopted as Section 8. Harloe’s assertion about the connection with Levitt apparently is based on a mimeographed, undated paper, but Davies provides evidence of McCarthy’s involvement with another builder, DAVIES, *supra* note 102, at 72, and reports the comment of liberal Republican Senator Charles Tobey, who attacked McCarthy and referred to McCarthy’s following instructions from the real estate lobby, *id.* at 69. See also United Negro & Allied Veterans, *supra* note 120, at 4-5 (“[W]e are alarmed at the sinister implications of Senator McCarthy’s report which sets forth that the Committee is preparing to present comprehensive housing legislation to cover aids to private enterprise. His expressed intention to separate public housing into separate legislation as though it were not a part of the total need, is a clear sign that forces are at work on/in [a strikeover provides both vowels] the Congress to wipe out entirely the possibility of the passage of public low-cost housing legislation at this session of Congress.”).

140. von Hoffman, *supra* note 122, at 308.

141. Peter Dreier, *Labor’s Love Lost? Rebuilding Unions’ Involvement in Federal Housing Policy*, 11 HOUSING POL’Y DEBATE 327, 327 (2000).

142. *Id.* at 336 (Democrats controlled the Senate 54 to 42 and the House, 263 to 171); Amenta & Skocpol, *supra* note 22, at 117-18 (“Truman picked up 74 seats in the House when he was elected in 1948. This . . . gave him a 91-vote majority overall, a margin comparable to Roosevelt’s

voting regularly for public housing since 1946; 1949 was to be no different.”¹⁴³ In the House, “public housing squeaked through by five votes on its crucial roll call.”¹⁴⁴

The Housing Act of 1949 was the only element of President Truman’s Fair Deal that was enacted by Congress.¹⁴⁵ Although it was “hailed as a major achievement by housing reformers,” it proved to be “a hollow victory.”¹⁴⁶ The 1949 Act may have done more harm than good: it was used to displace hundreds of thousands of people and, “in combination with other federal policies, did more to promote suburbanization, encourage businesses and middle-class Americans to abandon the cities, and exacerbate economic and racial segregation than to revitalize central cities More housing was razed than was built.”¹⁴⁷ Two

in 1938,” which had been “considered a disaster for the Democrats. Moreover, in every House throughout the 1940s, 105 Democrats came from the former states of the Confederacy, whose representatives had always tended to oppose . . . centralized social policies.”); see GELFAND, *supra* note 58, at 151 (the election “supplied the public housers with a slim, but working majority”); PATTERSON, *supra* note 60, at vii (“[T]he formation of a conservative coalition in Congress by 1939 was one of the most significant developments of recent American political history.”); see also KEITH, *supra* note 51, at 36 (“The passage of the United States Housing Act of 1937 was the high water mark for the tide of New Deal liberalism in housing.”); but cf. *supra* note 62 and accompanying text.

143. GELFAND, *supra* note 58, at 151.

144. *Id.*

The conservative Republican-Southern Democrat coalition that had prevented the public housing bill from emerging from committee for four years tried their delaying tactics once again, but persistent White House lobbying and firm Democratic leadership in the House broke through this blockade. During the six long days of debate on the House floor, marred by a fistfight and bitter charges and countercharges about public housing, Title I, the urban redevelopment section, was hardly discussed at all.

Id.; Amenta & Skocpol, *supra* note 22, at 110 (Southern Democrats generally did not support “the continuation of New Deal programs or social initiatives”); Margaret Weir et al., *Introduction: Understanding American Social Politics*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 22, at 23 (referring to “the special role of the South in modern American social policy making”); *id.* at 24 (referring to “the explicit racism that ensured white dominance over black majorities in all sectors of economic and social life” and explaining “why Southern politicians had so much leverage during and after the New Deal. . . . The influence of southern agricultural interests depended on the insertion of their class power as landlords and their social power as white racial oligarchs into federal political arrangements that from the 1890s to the 1960s allowed an undemocratized single-party South to coexist with competitive two-party democracy in the rest of the nation. Above all, southern leverage was registered through a congressionally centered legislative process in Washington that allowed key committee chairmen from safe districts to arbitrate precise legislative details and outcomes”).

145. Dreier, *supra* note 141, at 331, 336-37.

146. DAVIES, *supra* note 102, at 136.

147. Dreier, *supra* note 141, at 350; see generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (1964).

parts of the statute, urban redevelopment (Title I) and the expansion of the FHA program, were very much in the interests of developers.¹⁴⁸ While the legislation did include a public housing title, “the public housing program was essentially sabotaged” in several ways.¹⁴⁹

The public housing legislation had been burdened with restrictions “that limited it to the poor, gave local governments (especially suburbs) the right to decide whether and where to locate it, provided sufficient funding only to design and build boxlike structures, and permitted it to be racially segregated.”¹⁵⁰ Furthermore, as Peter Dreier has noted,

the opponents of public housing successfully undercut the implementation of the public housing part of the Housing Act of 1949 in [these] two ways. First, because federal law required local approval of all public housing developments, the real estate industry organized a national campaign, carried out at the local level, to block the construction of new public housing authorized by the act. . . . Second, Congress persistently failed to appropriate funds for the authorized number of units, and the program’s own regulations—including cost-per-unit limits and other standards imposed by Congress—tied the hands of local public housing officials, making it difficult to construct projects efficiently, quickly, and attractively. The Korean War also slowed down the implementation of public housing.¹⁵¹

Thus, when the WET/TWE bill became law, it proved entirely inadequate to provide for lower-income and other veterans who needed a subsidized rental

148. See, e.g., FUNIGIELLO, *supra* note 62, at 180 (“As Charles Abrams, Mel Scott, and other scholars have observed, it was in the developing programs of government, organized realtors, and their allies that the tentative outlines of the urban redevelopment statutes of the several states in the 1940s and the salient features of Title I of the Housing Act of 1949 were located.”).

149. Dreier, *supra* note 141, at 351.

150. *Id.* at 351; see also Gail Radford, *The Federal Government and Housing During the Great Depression*, in FROM TENEMENTS TO THE TAYLOR HOMES, *supra* note 49, at 102, 118 (describing the program created by the 1937 Act as “stingy” and “physically alienating”).

151. Dreier, *supra* note 141, at 348; see also DAVIES, *supra* note 102, at 126 (“In 1950 and 1951 the PHA had to reject proposals for over 6,000 units because their cost exceeded the \$1,750 per-room limit” established by the 1949 law.); *id.* at 126-27 (regarding industry’s “public education kits” for local opponents of public housing); *id.* at 127-28 (regarding industry’s encouragement of referenda against public housing: “By the end of 1951 thirty-eight such referendums had been held, and in twenty-five cases the real estate lobby emerged victorious”); von Hoffman, *supra* note 122, at 311 (The real estate industry launched “an anti-public housing campaign at the local level. Across the country, members of local real estate agencies and S&Ls [savings and loan associations] mobilized to close local housing authorities, veto housing projects, and reject housing appropriations or bonds.”); DAVIES, *supra* note 102, at 125 (“[B]y the expiration of the Administration’s term of office, forty-three months after the comprehensive bill became law, fewer than 60,000 of the authorized 810,000 units of public housing had been constructed and only twenty-six slum clearance projects had been started.”).

program. While it did mandate that veterans be given preference as tenants in public housing,¹⁵² it did not assure that very much, or very desirable, public housing would be constructed. Millions of veterans who had been left unserved by the G.I. Bill and VEHP continued to be unserved by the Housing Act of 1949.

E. Veterans' Housing Programs from 1950 to 2004

The pattern of early twenty-first century inadequate housing assistance to veterans was set in these decisions in the 1940s and early 1950s. While Congress has made some changes in the veterans' guaranteed home loan program,¹⁵³ and has added small programs of direct¹⁵⁴ and insured¹⁵⁵ home loans, a manufactured home loan guaranty program,¹⁵⁶ a tax-exempt bond program for five states,¹⁵⁷ and grants and direct loans for specially adapted housing for veterans with service-connected disabilities,¹⁵⁸ the principal housing program for veterans has

152. Housing Act of 1949, ch. 338, §§ 301-302, 63 Stat. 413, 422-23. The veterans' preferences later were eliminated. See NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS TENANTS' RIGHTS § 2.3 (3d ed. 2004) (discussing preferences).

153. See REPORT ON VETERANS' BENEFITS, *supra* note 6, at 59, 163 (discussing many instances in which the VA housing program served "as a sort of balance wheel for the building industry, and the economy"); 38 U.S.C. § 3710 (2000).

154.

38 U.S.C. § 3711; THE DOUGLAS COMM'N REPORT, *supra* note 96, at 103 ("[T]he VA was authorized to make direct loans where satisfactory home loans were not available. These direct loans were primarily intended . . . for thinly settled regions, small towns, etc. It was difficult to persuade lawmakers and the public that poverty-stricken persons in the cities were also, in practice, not welcome at the loan window—even if they were veterans."); REPORT ON VETERANS' BENEFITS, *supra* note 6, at 63.

Congress also created a direct loan program for Native American veterans to purchase, construct, or improve homes on trust lands. 38 U.S.C. § 3761 (a pilot program, created in 1993 and set to expire on December 31, 2005).

155. 38 U.S.C. § 3710.

156. 38 C.F.R. § 36.4204(a) (2004).

157. BARRY G. JACOBS, HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW § 3:3 (2004) [hereinafter HDR] (discussing a tax exempt bond program for purchase, rehabilitation, or improvement of homes owned by veterans, but this is limited to five states—Alaska, California, Oregon, Texas, and Wisconsin).

158. 38 U.S.C. § 2101 (creating a specially adapted housing grant program to assist veterans with service-connected disabilities "in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability"); 38 C.F.R. § 3.809 (2004). In VA 2005 Budget Highlights, the VA reports that it made 515 such loans in FY 2003 and estimates that it will make 615 in FY 2005. See VA, FY 2005 CONGRESSIONAL BUDGET SUBMISSION 3A-34 (Apr. 2004), available at <http://www.va.gov/budget/summary/index.htm>. But see GENERAL SERVICES AGENCY, THE CATALOG OF FEDERAL DOMESTIC ASSISTANCE 64.118 (Aug. 2004) [hereinafter CATALOG OF FEDERAL DOMESTIC ASSISTANCE] (regarding direct loans authorized by 38 U.S.C. § 3711 for veterans eligible for Specially Adapted Housing grants and reporting that

continued to be that of guaranteed home mortgage loans.¹⁵⁹ Except for a very small provision for homeless, disabled veterans, there is no subsidized rental program for veterans. Moreover, the implementation of the veterans' housing programs by the VA and the courts has not been generous to veterans.

This section discusses the administration of the veterans' housing programs by the VA and the interpretation of those programs by the courts, and then considers the particular provisions the VA has made for homeless veterans.

1. Agency Administration and Judicial Interpretation of the Veterans' Guaranteed Home Mortgage Loan Program.—To illustrate the restrictive constructions that have characterized agency and judicial supervision of the veterans' housing program, this section focuses on the standards governing deficiency judgments and foreclosure avoidance.

a. Deficiency judgments and related issues.—The first significant court test of the veterans' housing program was presented in *United States v. Shimer*, a case in which a veteran, George Shimer, had defaulted on a VA-guaranteed home mortgage loan.¹⁶⁰ The loan was for \$13,000; the guarantee, \$4000. The default occurred in May 1948, just a few months after the loan and guarantee had been consummated, in January of that year.¹⁶¹

After Mr. Shimer's default, the lender foreclosed and purchased the property for \$250 at a sheriff's sale. It then sold the property for \$10,500 and collected the \$4000 guarantee from the VA (thus recouping, in total, more than the loan amount). The VA then sought to recover the \$4000 from George Shimer, who resisted on the ground that the Pennsylvania Deficiency Judgment Act barred a deficiency judgment unless the mortgagee petitioned (within six months of the sale) to fix the fair market value of the property, a step that the lender had not taken. Both the district court and the court of appeals agreed with the veteran. The court of appeals held that the VA's recovery from a veteran "is limited to the amount which the V.A. under the statute is required to pay on its guaranty and not the amount which it actually pays,"¹⁶² and that the VA's obligation was to be determined by the state statute. The court said it was convinced "that Congress never intended to deprive veteran-mortgagors of the benefits of Acts such as the Pennsylvania one that is clearly ameliorative. Certainly there was no intention to put these individuals in a worse position than nonveteran-mortgagors."¹⁶³ The United States Supreme Court, however, disagreed, holding that Congress had intended to displace such state law protections for borrowers. The Supreme

in FY 2002 "no direct loans were made in conjunction with Specially Adapted Housing grants" and that in FY 2004 and 2005, one loan of \$33,000 was expected to be closed each year), *available at* <http://www.cfda.gov/public/viewprog.asp?progid=798>.

159. HDR, *supra* note 157, § 9:140 (Neither the direct nor the insured home loan program is as active as the guaranteed home loan program.).

160. *United States v. Shimer*, 367 U.S. 374 (1961). Many of the facts are taken from the opinion in the court of appeals, *United States v. Shimer*, 276 F.2d 792 (3d Cir. 1960).

161. *Shimer*, 276 F.2d at 795.

162. *Id.*

163. *Id.* at 797.

Court decided that the assistance Congress intended for veterans was limited to "the substantial equivalent of a down payment . . . in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home," and that Congress had not intended that a mortgagee also be subject to a state law which would impose additional cost and additional risk.¹⁶⁴

The *Shimer* case illuminates an agency and judicial preference for protecting lenders rather than veterans; in general, that preference has continued through the decades. Many states have protected homebuyer-mortgagors by either prohibiting deficiency judgments after non-judicial foreclosures or allowing deficiency judgments after non-judicial foreclosure only if there has been a judicial determination of the fair market value of the property. The general rule today, however, is that those protections do not cover VA loans.¹⁶⁵

In 1990, the Ninth Circuit considered the deficiency judgment issue in *Whitehead v. Derwinski*, which concerned Washington State's foreclosure requirements.¹⁶⁶ Washington State allowed both judicial and nonjudicial foreclosures, but permitted deficiency judgments only after judicial foreclosure.¹⁶⁷ In *Whitehead*, the Ninth Circuit held that when the VA instructed a Washington State lender to use nonjudicial foreclosure, the VA was not entitled to seek a deficiency judgment against the veteran.¹⁶⁸

Whitehead was followed in some cases and not followed in others. In 1993, it was reconsidered and overruled by the Ninth Circuit en banc in *Carter v. Derwinski*.¹⁶⁹ *Carter* puts the Ninth Circuit in agreement with the Seventh and Eighth Circuits;¹⁷⁰ the Fourth and Tenth Circuits have since indicated agreement with that position.¹⁷¹

Carter involved the Idaho foreclosure laws. In Idaho, as in Washington State, lenders who use judicial foreclosure may secure deficiency judgments. In addition, in Idaho, lenders who use non-judicial foreclosure may secure deficiency judgments if they obtain a fair market valuation within three months

164. *Shimer*, 367 U.S. at 383.

165. See, e.g., *Dixon v. United States*, 68 F.3d 1253, 1255 n.1 (10th Cir. 1995) (VA regulations preempt Oklahoma's strict requirement that a motion for a deficiency judgment must be made within ninety days after a foreclosure sale or no right to recover any deficiency "shall exist"); *United States v. Rossi*, 342 F.2d 505, 506 (9th Cir. 1965) (VA regulations preempt California prohibition of deficiency judgments on notes secured by purchase money mortgages).

166. *Whitehead v. Derwinski*, 904 F.2d 1362 (9th Cir. 1990), overruled by *Carter v. Derwinski*, 987 F.2d 611 (9th Cir. 1993) (en banc).

167. WASH. REV. CODE ANN. §§ 61.12.040, 61.24.040, 61.24.100 (West 2004); see *Carter*, 987 F.2d at 611; *Whitehead*, 904 F.2d at 1362.

168. *Whitehead*, 904 F.2d at 1369.

169. *Carter*, 987 F.2d at 611.

170. *Id.* at 613 (discussing *United States v. Davis*, 961 F.2d 603 (7th Cir. 1992), *Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991), and *Boley v. Principi*, 144 F.R.D. 305, 1992 WL 330423 (E.D.N.C. Nov. 10, 1992)).

171. *Dixon v. United States*, 68 F.3d 1253, 1255 n.1 (10th Cir. 1995); *Boley v. Brown*, 10 F.3d 218 (4th Cir. 1993).

of the non-judicial foreclosure. The plaintiffs in *Carter* were Idaho veterans who sought relief from the VA's claims for deficiency judgments, because the VA had used non-judicial foreclosure and had not obtained any fair market valuation within three months.

The district court in *Carter*, following *Whitehead*, granted relief to the veterans.¹⁷² On appeal, however, the Ninth Circuit, en banc, held that the VA could secure a deficiency judgment even though it had not complied with the state law requirements for doing so.¹⁷³ The majority opinion, written by Judge Kozinski, reached this conclusion by deciding that the VA has two rights, subrogation and indemnity, that only the right of subrogation is affected by the state law, and that the right of indemnity survives.¹⁷⁴

As the Ninth Circuit acknowledged, the right of subrogation is the only one mentioned in the statute, which directs that "in the event of default . . . the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty."¹⁷⁵ The court said that the VA regulation, however, "also gives the Secretary a right of indemnity," for the regulation provides that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran . . . shall constitute a debt owing to the United States by such veteran."¹⁷⁶ The Ninth Circuit held that the right of indemnity prevails, regardless of the state law. For this holding, it relied on the Supreme Court's 1961 decision in *United States v. Shimer*, in which the Supreme Court had said that "the statute affords an independent right of indemnity to the Veterans' Administration."¹⁷⁷ The Ninth Circuit said that Shimer's "square holding—that the regulation provides an independent right of indemnity against the veteran—is directly applicable to this case."¹⁷⁸

The *Carter* court rejected the *Whitehead* court's assumption that the "right of indemnity was secondary to the right of subrogation . . . available only when subrogation was impossible."¹⁷⁹ It found no basis for this ranking, although the indemnity right derives not from the statute but from a regulation. The *Carter* court said that the *Whitehead* "rationale has intuitive appeal. It seems fair to recognize the *quid pro quo* involved in the use of nonjudicial foreclosure. . . . But this approach is not consistent with the regulations as written by the VA and as interpreted by the Supreme Court in *Shimer*."¹⁸⁰

The *Carter* court emphasized that

[t]he VA is not a private litigant, limited to the choices provided by state

172. *Carter v. Derwinski*, 758 F. Supp. 603, 608 (D. Idaho 1991).

173. *Carter*, 987 F.2d at 614.

174. *Id.*

175. *Id.* (citing 38 U.S.C. § 3732(a)(1)).

176. *Id.* at 611 (citing 38 C.F.R. 36.4323).

177. *United States v. Shimer*, 367 U.S. 374, 387 (1961), quoted in *Carter*, 987 F.2d at 613.

178. *Carter*, 987 F.2d 613 n.1.

179. *Id.* at 614.

180. *Id.*

law; it's an arm of the federal government and cannot be deprived of the benefits of federal law, regardless of any election it may make under state law. Federal law is mandatory, and neither the State of Idaho through legislation, nor the VA through its litigation choices, can waive its applicability.¹⁸¹

Four judges on the Ninth Circuit dissented. In an opinion written by Judge Beezer, they maintained that *Shimer* endorsed the application of "equitable principles of surety law . . . in defining the VA's recovery rights."¹⁸² They identified as the crucial factor the VA's voluntary rejection of the opportunity to seek a deficiency judgment.¹⁸³ Under the dissent's reasoning, *Shimer* stands only for the propositions that equitable principles must determine the VA's rights, and that a state that forbids deficiency judgments altogether would inequitably deprive the VA of recourse against the borrower. The *Carter* dissenters reasoned that since in *Carter* the VA, having an alternative, voluntarily chose a course that, under state law, released the veteran from liability, allowing the VA nonetheless to pursue a deficiency judgment would be inequitable and therefore is not required under suretyship principles. "*Shimer*," the dissenters maintained, "simply does not stand for the inequitable proposition that the VA may recover amounts paid on its guaranty after authorizing the veteran's release from liability."¹⁸⁴

As the opinion of the four *Carter* dissenters shows, the federal statute does not necessarily require stripping veterans of their protection from deficiency judgments where there has been no independent assessment of fair market value. The dissenters' reasonable interpretation of *Shimer* would afford veterans the same protections from unsupervised deficiency judgments enjoyed by non-veteran borrowers. But the majority in *Carter*—and other courts of appeals that have considered this issue—hold that the VA is entitled to recover deficiency judgments from veterans even though state law would protect non-veteran debtors from deficiency judgments in this situation and even though the VA could have secured a deficiency judgment had it followed a different procedure.

In a different context, the Fourth Circuit distinguished *Shimer* from the kind of situation presented in *Carter*, noting that "[i]n *Shimer*, the Pennsylvania law . . . was directly in conflict with the federal regulations . . ."¹⁸⁵ The Fourth Circuit said that where "state law does not conflict with any federal regulation . . . *Shimer* is not directly controlling."¹⁸⁶ In the Fourth Circuit case, *Boley v. Brown*, however, the Fourth Circuit followed the reasoning of *Carter* and the Seventh and Eighth Circuits,¹⁸⁷ holding that "[t]he VA's right to indemnification

181. *Id.* at 615.

182. *Id.* at 617.

183. *Id.*

184. *Id.*

185. *Boley v. Brown*, 10 F.3d 218, 221 n.5 (4th Cir. 1993).

186. *Id.* at 221.

187. *United States v. Davis*, 961 F.2d 603 (7th Cir. 1992), *Vail v. Derwinski*, 946 F.2d 589

is a federal right given as part of a nation-wide federal program that should not be affected by state law.”¹⁸⁸

The *Carter* court’s holding is particularly surprising—especially in a decision written by Judge Kozinski—because it sacrifices state to federal law, and does that in a situation in which the federal law mandates compliance with state law. Indeed, the federal law does not simply provide, as the *Carter* court paraphrases, that “[f]oreclosure of the property is to be done in accordance with state law.”¹⁸⁹ Rather, the federal statute specifically and particularly preserves protections afforded by state law, directing that “[t]he acquisition of any such property shall not . . . impair the rights under the State . . . law of any persons on such property.”¹⁹⁰ One of the most important “rights under the State . . . law” of the “persons on such property”—the mortgagor-homeowners—is the State law right to be protected against deficiency judgments absent a prior judicial determination of fair market value. This right is impaired—indeed, destroyed—by the *Carter* court’s ruling.

The *Carter* court concluded that “[b]ecause this federal indemnity right doesn’t depend on state foreclosure or deficiency law, preemption analysis is unnecessary.”¹⁹¹ But the issue is not whether state foreclosure law applies. Rather, the issue is whether the court has honored the federal law, which directs that “rights under the State . . . law” are not to be impaired.¹⁹²

A related situation in which the VA and the courts treat veteran borrowers less favorably than non-veteran borrowers is addressed in *Wells v. U.S. Administrator of Veterans Affairs*.¹⁹³ Plaintiffs there were former owners of homes subject to VA loan guarantees. Plaintiffs had defaulted and the mortgagees had foreclosed. Plaintiffs argued that they had a constitutionally protected property interest in continued occupancy—as tenants. They relied on decisions holding that after foreclosure of FHA-insured mortgages, non-owner occupants had a “protectable interest in continued occupancy.”¹⁹⁴ In *Wells*, the

(8th Cir. 1991).

188. *Boley*, 10 F.3d at 222.

189. *Carter*, 987 F.2d at 612.

190. 38 U.S.C. § 3720(a)(6) (2000).

191. *Carter*, 987 F.2d at 616.

192. For loans guaranteed after January 1, 1990, “veterans who pay the funding fee will not be liable to the VA for any deficiency upon default except in case of ‘fraud, misrepresentation, or bad faith’ by the veteran in obtaining the loan or creating the default.” Bernard Ingold, *The Department of Veterans’ Affairs Home Loan Guaranty Program: Friend or Foe?*, 132 MIL. L. REV. 231, 245 (1991) (citing Veterans’ Benefits Amendments of 1989, Pub. L. No. 101-237, § 304, 103 Stat. 2062 (amending then 38 U.S.C. § 1803)). Prior to this, the VA had the discretion to release a veteran from liability on a defaulted loan if collection of the “indebtedness would be against equity and good conscience.” *Id.* (citing former 38 U.S.C. § 3102(b)(1988)). The 1989 Act, however, eliminated that discretion from the VA. *See id.* (nonetheless advising veterans to seek such waivers).

193. 537 F. Supp. 473 (E.D.N.Y. 1982).

194. *Id.* at 476 (citing *Caramico v. Secretary of HUD*, 509 F.2d 694, 701 (2d Cir. 1974));

court held that occupants of VA-financed homes were not entitled to the protections available to occupants of FHA-financed homes. The difference, the court held, was that the VA legislation had no intent to aid tenants as well as homeowners. "Rental housing is nowhere mentioned in the statute,"¹⁹⁵ the court said. "Its only purpose is to aid the returning veteran in purchasing a home. In no way can such a narrow goal be reasonably stretched to imply an intent to provide subsidized federal rental housing."¹⁹⁶ Thus, the court said, the plaintiffs "have already received the intended benefit—assistance in purchasing a home. The relief they request, that is, to be allowed to remain as tenants, does not fall within the scope of the statute."¹⁹⁷ In this way, *Wells* insists not only that Congress was concerned only with veterans who could become homeowners but also that Congress' interest in those veterans ended the moment they became unable to continue the homeownership status.

b. *Foreclosure avoidance*.—The Veterans Administration—and the courts—also have demonstrated more concern for lenders than for veteran-borrowers with regard to assisting borrowers to avoid foreclosure. Other federal agencies that guarantee or insure home mortgage loans—the Department of Housing and Urban Development (HUD) and the Department of Agriculture (DoA)—have foreclosure avoidance programs,¹⁹⁸ but the Department of Veterans Affairs has refused to administer such a program.

It long has been understood that the primary danger in homeownership is loss of income by the homeowner, whether because of unemployment, illness, spousal abandonment, or other cause. In 1965, Charles Abrams wrote that "[t]he principal hazard in homeownership is unemployment or 'curtailment of income.'"¹⁹⁹ He cited a 1963 study in which

this was the given reason for defaults for 35 per cent of all FHA

Manners v. Secretary of HUD, 71 CV 550 (E.D.N.Y. 1973).

195. *Wells*, 537 F. Supp. at 476-77.

196. *Id.*

197. *Id.* at 477.

198. For HUD-assisted borrowers, the current protections are provided by the Federal Housing Administration (FHA) Loss Mitigation Program. See *Ferrell v. HUD*, 186 F.3d 805 (7th Cir. 1999); 12 U.S.C. § 1715(u) (2000); 24 C.F.R. § 203 (2004); HUD, Mortgagee Letter 00-05 (Jan. 19, 2000), available at <http://www.hudclips.org>. With respect to the Department of Agriculture, see Housing Act of 1949, ch. 338, § 505, 63 Stat. 434, 435 (codified as amended at 42 U.S.C. § 1475 (2000)); *United States v. Garner*, 767 F.2d 104 (5th Cir. 1985) (discussing the moratorium and refinancing options available to DoA); NATIONAL HOUSING LAW PROJECT, RHCDS (FMHA), HOUSING PROGRAMS: TENANTS' AND PURCHASERS' RIGHTS, at 19/1-19/19 (2d ed. 1995) [hereinafter TENANTS' AND PURCHASERS' RIGHTS]; 7 C.F.R. § 1965.26 (2004). Some relief from foreclosure is provided for some service members on active duty. See 50 U.S.C. app. § 533 (Supp. I 2003) (originally enacted as Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, § 303, 54 Stat. 1178, 1183); see also 12 U.S.C. §§ 1739 and 1750c (2000) (providing protection for government-insured lenders disadvantaged by the Civil Relief Act).

199. CHARLES ABRAMS, THE CITY IS THE FRONTIER 262 (1965).

borrowers and for about 40 per cent of VA borrowers. The second reason was “death or illness in family.” In each of the six metropolitan areas studied by FHA in 1962, at least 44 per cent of the FHA, VA, or conventional loan borrowers had suffered a decline in income between the time of loan origination and the day of foreclosure.²⁰⁰

The VA found that 64 percent of the defaults were due to “curtailment of income,” “death or illness,” or “marital difficulties.”²⁰¹

Subsequent studies have produced similar results: unemployment, death, illness, and spousal abandonment are major reasons why homeowners lose their homes through default and foreclosure.²⁰² Defaults also are likely to occur in areas where home values are declining.²⁰³ These losses can be devastating to the homeowners and their families not only financially, but also psychologically and socially;²⁰⁴ the losses also are expensive to the federal agency that has insured or guaranteed the mortgage loan.²⁰⁵ But despite the human, societal, personal, and financial costs of foreclosure, government agencies have been reluctant to implement any form of foreclosure avoidance program—and the DVA has been most reluctant of all.

200. *Id.* (citing HOUSING & HOME FINANCE AGENCY, MORTGAGE FORECLOSURES IN SIX METROPOLITAN AREAS (June 1963)).

201. *Id.* (citing VA, REP. OF LOAN SERVICE AND CLAIMS STUDY (Apr. 30, 1962)). The precise percentages were: Curtailment of income, 39%; Death or illness, 16%; Marital difficulties, 9%. The other causes were “Improper regard for obligations,” 26%; “Extensive obligations,” 7%; and “All other reasons,” 3%. *Id.* Abrams wrote that “[i]f the reasons as given by the owners were credited, a good part of the 26 per cent of defaults for ‘improper regard for obligations’ would be added to the 55 per cent [of defaults due to curtailment of income and death or illness].” *Id.* at 263.

202. *See, e.g.*, DVA OIG, REPORT No. 9R5-B10-047, 9-10, 30 (Mar. 25, 1999) [hereinafter DVA OIG REPORT]; *but see id.* at 33 (discussing the difficulties of identifying the reason for a particular default); *see also* Sheila Crowley, *The Affordable Housing Crisis: Residential Mobility of Poor Families and School Mobility of Poor Children*, 72 J. NEGRO EDUC. 22, 28 (2003) (homeowners with few or no financial assets often “spend dangerously high percentages of their income on housing,” and then often are unable to meet the “unanticipated costs for home repair” that frequently appear).

203. *See* DVA OIG REPORT, *supra* note 202, at i, 4-5 (stating that loan defaults were higher in “vicinities with declining home values”); *see also* William N. Goetzmann & Mathew Spiegel, *Policy Implications of Portfolio Choice in Underserved Mortgage Markets*, in LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 257-8, 263, 266 (Nicholas P. Retsinas & Eric S. Belsky eds., 2002) [hereinafter LOW-INCOME HOMEOWNERSHIP] (discussing the occurrence of such conditions in the United States).

204. *See* William M. Rohe et al., *Social Benefits and Costs of Homeownership*, in LOW-INCOME HOMEOWNERSHIP, *supra* note 203, at 381, 388 (“little, if any, research exists on the impacts of foreclosure on a person’s self-esteem or any other psychological constructs”).

205. *See, e.g.*, DVA OIG REPORT, *supra* note 202, at 5 (discussing losses to the government and the veteran); GAO, HOUSING PROGRAMS: INCREASED USE OF ALTERNATIVES TO FORECLOSURE COULD REDUCE VA’S LOSSES, GAO/RCED-90-4, at 19 (Dec. 1989).

Abrams had made two suggestions in the 1960s: the establishment of a fund from which owners could borrow, and the provision of equity insurance.²⁰⁶ Abrams's suggestions were rejected.²⁰⁷ None of the agencies adopted a foreclosure avoidance program voluntarily.

Both the HUD and DoA foreclosure avoidance programs were mandated by litigation,²⁰⁸ but similar litigation against the VA was uniformly unsuccessful.²⁰⁹ A typical case is *Rank v. Nimmo*, involving John Rank, a veteran, and his wife, who together bought a home with a VA guaranteed mortgage loan in 1971 but defaulted in 1975, after John Rank had been laid off from his job.²¹⁰ The VA had the option of "refunding" defaulted loans, whereby, as the court explained, "[t]he VA . . . may take over defaulted mortgages from private lenders and avoid foreclosure by extending forbearance to the veteran."²¹¹ Moreover, the VA's Lenders' Handbook and pertinent circular and manuals all expressed policies of assisting veterans in retaining their homes where foreclosure might reasonably be avoided.²¹² Nonetheless, the VA conceded that it never had exercised the refunding option in the Los Angeles region between 1974 and 1976.²¹³

The district court held that the VA had abused its discretion in failing even to explain its reasons for not exercising the refunding option.²¹⁴ The court of appeals reversed, holding that the veteran had no cause of action under either the VA statute or the Administrative Procedure Act.²¹⁵ Other courts have followed the lead of the Ninth Circuit in *Rank*.²¹⁶

As the courts have not required the VA to implement any foreclosure

206. ABRAMS, *supra* note 199, at 263.

207. *Id.* at 264-65.

208. See *Brown v. Lynn*, 385 F. Supp. 986 (N.D. Ill. 1974); *subsequent opinions sub nom. Ferrell v. Pierce*, 560 F. Supp. 1344 (N.D. Ill. 1983), *aff'd*, 743 F.2d 454 (7th Cir. 1984) (HUD); *United States v. White*, 429 F. Supp. 1245 (N.D. Miss. 1977), *on remand from* 543 F.2d 1139 (5th Cir. 1976) (DoA); see also David B. Bryson, *The Role of the Courts and a Right to Housing*, in *THE RIGHT TO HOUSING* (Rachel Bratt et al. eds., forthcoming 2005). The HUD Mortgage Assignment Program, created by the Brown/Ferrell litigation, subsequently was replaced by a modified program enacted by Congress. See *Ferrell v. HUD*, No. 73C334, 2002 U.S. Dist. LEXIS 16156, at *3-4 (N.D. Ill. Aug. 22, 2002) (discussing the Balanced Budget Downpayment Act I, Pub. L. No. 104-99, § 407, 110 Stat. 26 (1996) (codified as amended at 12 U.S.C. § 1715(u) (2000)); see also *supra* note 198.

209. See *Rank v. Nimmo*, 677 F.2d 692 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982); *Simpson v. Cleland*, 640 F.2d 1354 (D.C. Cir. 1981); *United States v. Harvey*, 659 F.2d 62 (5th Cir. 1981); *Gatter v. Cleland*, 512 F. Supp. 207 (E.D. Pa. 1981), *aff'd sub nom. Gatter v. Nimmo*, 672 F.2d 343 (3d Cir. 1982); *Buzinski v. Brown*, 6 Vet. App. 360, 369 (1994).

210. *Rank*, 677 F.2d at 695.

211. *Id.* at 694.

212. *Id.* at 694-95.

213. *Id.* at 700.

214. *Rank v. Cleland*, 460 F. Supp. 920, 926 (C.D. Cal. 1978); *Rank*, 677 F.2d at 693.

215. *Rank*, 677 F.2d at 701.

216. See *supra* note 209.

avoidance program, the VA never has done so voluntarily.²¹⁷ Thus, while HUD and DoA borrowers enjoy some protection from foreclosures because of temporary financial problems for which they are not to blame,²¹⁸ veterans who suffer temporary loss or reduction of income for reasons beyond their control have no protection from foreclosure that causes loss of their family home.²¹⁹

The virtual absence of any foreclosure avoidance program for VA-assisted homes is a serious problem, for a substantial number of VA financed homes go into default each year.²²⁰ The VA unquestionably has the authority to prevent foreclosures. The statute provides that the Secretary may “consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any note, contract, mortgage or other instrument securing a loan which has been guaranteed, insured, made or acquired under this chapter.”²²¹ Under the “refunding” option,

the VA, prior to commencement of foreclosure proceedings, pays the lender the unpaid portion of the veteran’s loan and the lender assigns its interest and security in the loan to the VA. The veteran then makes monthly payments directly to the VA until the loan is satisfied. The veteran must be able to establish an ability to repay the loan and a decision by the VA not to refund a loan is not judicially reviewable.²²²

But the courts have held that veteran-borrowers cannot compel the VA to use any of the ameliorative authority it possesses.²²³

217. See DVA OIG REPORT, *supra* note 202, at 5 (“[The] VA may choose to refund the loan or accept a deed-in-lieu [of foreclosure], but will do so only if the property has enough equity to make these alternatives advantageous to the government.”).

218. See ABRAMS, *supra* note 199, at 262-65; see also *supra* note 208.

219. VA staff may, in some circumstances, arrange an interest rate reduction refinancing loan. See DVA OIG REPORT, *supra* note 202, at i-ii.

220. See DVA, *Guaranteed Loans, Defaults and Claims, and Property Management, FY 1998-2001*, at <http://www.va.gov/vetdata/ProgramStatics/index01.htm> (last updated Apr. 17, 2003) (indicating 118,426 defaults reported in FY 1999, 132,147 in FY 1998, and 132,534 in FY 1997). Compare DVA OIG REPORT, *supra* note 202, at 19 (132,245 in default at the end of FY 1997). Note that approximately 18.5% of these loans are to service members on active duty, and that a DVA study of loans that defaulted between 1995 and 1997 showed that “[loans] acquired by service members were more likely to default than loans acquired by veterans” and that 26.5% of the default loans were to service members. DVA OIG REPORT, *supra* note 202, at 1.

221. 38 U.S.C. § 3720(a)(2) (2000). In situations of major disaster as determined under the Disaster Relief and Emergency Assistance Act, the act provides that the Secretary “shall . . . pursuant to subsection (a)(2) . . . extend on an individual case basis such forbearance or indulgence to such owner as the Secretary determines to be warranted by the facts of the case and the circumstances of such owner.” *Id.* § 3720(f).

222. Ingold, *supra* note 192, at 242 (citing 38 C.F.R. § 36.4318 (1988); *Fitzgerald v. Cleland*, 498 F. Supp. 341 (D. Me. 1980); 38 U.S.C. § 1816(a) (1988)); 38 U.S.C. § 3732(a)(2).

223. Ingold, *supra* note 192, at 241 (“These discretionary provisions are designed for the benefit of the VA, not the veteran, and are not subject to judicial review.”); see *supra* notes 209-15

2. *The VA's Programs for Homeless Veterans.*—From the enactment of the G.I. Bill in 1944, save for the short-lived VEHP and section 608 programs and the VA hospital system, the federal government's provision of housing assistance for veterans continued to be for homeownership only. Beginning in the 1980s, however, large numbers of people in the United States began to experience homelessness, and a significant percentage of those people were veterans.²²⁴ In response to litigation and other forms of pressure, the VA made available some surplus VA properties to organizations serving homeless veterans.²²⁵ It also sells and leases some foreclosed properties to organizations that serve homeless people.²²⁶ That aside, the "[t]wo major VA homeless programs [have been] Health Care for Homeless Veterans (HCHV) and Domiciliary Care for Homeless Veterans (DCHV),"²²⁷ both of which serve veterans through the VA Medical Centers.²²⁸ HCHV serves veterans who are homeless and mentally ill;²²⁹ in general, it relies on "community-based residential treatment facilities" that are

and accompanying text (discussing *Rank v. Nimmo*).

224. See MARTHA BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s*, at vii-viii, 3 (1992); 42 U.S.C. § 11301(a)(1) (2000) (commonly known as the McKinney Act) (stating that "the Nation faces an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families, including . . . veterans"); COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, INSTITUTE OF MEDICINE, *HOMELESSNESS, HEALTH, AND HUMAN NEEDS* 138 (1988) ("There are a substantial number of veterans among the homeless, especially from the Vietnam era."); HEROES TODAY, *HOMELESS TOMORROW?*, *supra* note 11; BLAU, *supra* note 12, at 29 ("Veterans make up about one-third of the homeless male population."); *HOMELESSNESS IN LOS ANGELES*, *supra* note 11, at 15 (In Los Angeles, "[v]eterans are almost twice as likely as all adults to be homeless," and "Vietnam veterans make up the largest block of homeless veterans.").

225. See Nat'l Law Ctr. on Homelessness and Poverty v. U.S. Veterans' Admin., 765 F. Supp. 1, 8-9 (D.C. Cir. 1991) (regarding leasing buildings at a VA Medical Center in Arkansas to a homeless provider); Nat'l Coalition for the Homeless v. U.S. Veterans' Admin., 695 F. Supp. 1226, 1234 (D.C. Cir. 1988) (ordering the VA and other agencies to comply with provisions of the McKinney Act regarding use of surplus federal properties to assist homeless people); *id.* at 1230 n.6 (holding that VA-foreclosed single-family homes are not subject to the McKinney Act); Lee v. Pierce, 698 F. Supp. 332, 340-41 (D.C. Cir. 1988) (holding that HUD-foreclosed single-family homes are not subject to the McKinney Act).

226. See DVA, *Fact Sheet: VA Programs for Homeless Veterans* (Jan. 2003), at http://www.hrsa.gov/homeless/pa_materials/pre-site/pa4/pa4_va_fact_sheet.htm [hereinafter DVA Fact Sheet Jan. 2003] (stating that "more than 180 properties have been sold and 9 properties . . . leased to provide housing for the homeless"); DVA Fact Sheet Dec. 2004, *supra* note 11 (referring only to the properties sold).

227. GAO REPORT, *supra* note 11, at 4.

228. See HOMBS, *supra* note 10, at 112-14.

229. See *id.* at 112; GAO REPORT, *supra* note 11, at 4 n.4 (HCHV initially was called the Homeless Chronically Mentally Ill (HCMI) program; the VA uses the term HCHV to "avoid use of the term 'chronically mentally ill'"); *id.* at 5 (mental illness in this context includes substance abuse).

time limited, “generally for less than 6 months,”²³⁰ and relatively few beds—about 425 beds in 2002—provided by the VA itself for a Transitional Residence program.²³¹ Under DCHV, “homeless veterans receive rehabilitative services while occupying dedicated beds at VA medical centers.”²³² DCHV provided more than 1800 beds at 35 VA medical centers in 26 states, offering “residential treatment to over 5000 homeless veterans each year.”²³³

As part of the HCHV programs, the VA also has a Homeless Providers Grant and Per Diem (GPD) program, which is designed to foster the creation of new facilities for homeless veterans.²³⁴ The maximum number of beds VA has attributed to GPD is 8000.²³⁵

In addition to these programs, in 1992, DVA and HUD agreed to create the HUD-VA Supported Housing (HUD-VASH) program for homeless veterans who have severe psychiatric or substance abuse disorders.²³⁶ HUD-VASH provides a setaside of HUD Section 8 vouchers and VA case management, health, and other supportive services, which are to be made available for the term of the Section 8 assistance.²³⁷ Through 2003, HUD had designated 1780 Section 8

230. GAO REPORT, *supra* note 11, at 5, 6; GAO, HOMELESS VETERANS—VA EXPANDS PARTNERSHIPS, BUT EFFECTIVENESS OF HOMELESS PROGRAMS IS UNCLEAR, GAO/T-HEHS-99-150, at 5 (June 24, 1999) (statement of Cynthia A. Bascetta, Associate Director, Veterans Affairs and Military Health Care Issues), *available at* <http://www.gao.gov/archive/1999/he99150t.pdf> [hereinafter GAO BASCETTA].

231. *VA Has Largest Homeless Services Network, Works with HUD, Nonprofits to Expand Housing*, 30 No. CD-16 HOUSING & DEV. REP. CURRENT DEVS. 501, 501 (2002).

232. GAO BASCETTA, *supra* note 230, at 7.

233. DVA Fact Sheet Dec. 2004, *supra* note 11.

234. Homeless Veterans Comprehensive Service Programs Act of 1992, Pub. L. No. 102-590, 106 Stat. 5136; 38 C.F.R. § 61.0 - 61.82 (2004); DVA, *Grant & Per Diem Program*, at <http://www1.va.gov/homeless/page.cfm?pg+3> (last visited Dec. 28, 2004); Statement of Frances M. Murphy, Deputy Undersecretary for Health, DVA, before the House Committee on Veterans Affairs 3-4 (Sept. 20, 2001), *available at* http://www.va.gov/OCA/testimony/20se01FM_USA.htm [hereinafter Murphy Statement]; DVA Fact Sheet Dec. 2004, *supra* note 11 (referring to the program’s inception in FY 1994); GAO BASCETTA, *supra* note 230, at 5.

235. *See* DVA Fact Sheet Dec. 2004, *supra* note 11 (stating that “[n]early 20,000 homeless veterans are expected to be provided supported housing under this program in more than 8,000 funded beds annually”). This is a dramatic increase from the VA’s January 2003 Fact Sheet, which referred to 6000 beds and stated that “more than 10,000 homeless veterans are provided supported housing under this program annually.” DVA Fact Sheet Jan. 2003, *supra* note 226.

236. *See* Robert Rosenheck et al., *Cost-effectiveness of Supported Housing for Homeless Persons with Mental Illness*, 60 ARCHIVES GEN. PSYCHIATRY 940, 941 (2003) (describing the origin of the program in an interagency agreement); Murphy Statement, *supra* note 234, at 3-4. The HUD-VASH program was codified in the Homeless Veterans Comprehensive Assistance Act of 2001, Pub. L. No. 107-95, § 5, 115 Stat. 903, 913 (codified as amended in 38 U.S.C. § 2041-43 (Supp. I 2001)).

237. DVA, *VA Homeless Programs and Initiatives*, at <http://www1.va.gov/homeless/page.cfm?pg=2> (last updated July 7, 2004). The Section 8 voucher program originally was a Section 8

vouchers for this program.²³⁸ The VA also operates a VA Supported Housing Program, but it offers only supportive services, including help in finding private or other government assisted housing.²³⁹

In 1998, Congress enacted the Veterans Programs Enhancement Act, which authorized the VA to guarantee up to \$100 million in loans to construct, rehabilitate, or acquire land for multifamily transitional housing projects for homeless veterans.²⁴⁰ But DVA has not exercised this authority.²⁴¹ Thus, while some provision has been made for homeless veterans, it still is the case that the only significant housing program for veterans is the guaranteed home mortgage loan program.

II. CONSEQUENCES OF THE FOCUS ON HOMEOWNERSHIP IN THE G.I. BILL

As Part I described, since World War II, the federal government's provision of housing assistance for veterans has largely been limited to guaranteeing home mortgage loans. There are three crucial limitations to this program: the aid is for homeownership only; the aid includes no direct subsidy; and the aid relies on private lenders. The decision to offer such limited homeownership assistance has meant that many veterans have been excluded from the program.

Thus, while discussions of the G.I. Bill, which usually focus on the educational provisions, often characterize it "as a broad-based, universal program . . . open to any veteran who wished to take advantage of it"²⁴² this certainly is

certificate program. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 653, § 201(a) (codified as amended at 42 U.S.C. § 1437f(o) (2000)). It now is the Housing Choice Voucher Program. See Quality Housing and Work Responsibility Act of 1998, 42 U.S.C. § 1437f (2000).

238. DVA Fact Sheet Jan. 2003, *supra* note 226; DVA Fact Sheet Dec. 2004, *supra* note 11 ("more than 1,750 vouchers").

239. See DVA Fact Sheet Dec. 2004, *supra* note 11 ("VA staff work with private landlords, public housing authorities and nonprofit organizations to find housing arrangements."). But see *infra* text accompanying note 351 (indicating that many veterans are discharged without housing).

240. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 601, 112 Stat. 3315 (codified as amended at 38 U.S.C. § 3772 (2000)).

241. See VA, FY 2005 CONGRESSIONAL BUDGET SUBMISSION, *supra* note 158, at 3A-34 (indicating that no such loans were established in FY 2003, and the FY 2004 estimate of 3 loans is carried forward to FY 2005); but cf. DVA Fact Sheet Dec. 2004, *supra* note 11 (stating that "The Multifamily Transitional Housing Loan Guarantee for Homeless Veterans Program has made several conditional commitments to establish housing for formally [sic] homeless veterans").

242. Mettler, *supra* note 5, at 354. There is room for doubt whether in its administration the educational provisions of the G.I. Bill were as available to women as to men, to non-whites as to whites, or to those of lower class and income groups as to those of higher class and income groups. See, e.g., Suzanne Mettler & Eric Welch, Policy Feedback and Political Participation: Effects of the G.I. Bill on Political Involvement Over the Life Course 11 n.11 (Apr. 4, 2001) (presentation at the American Political Development Workshop, University of Wisconsin-Madison) (noting that, with respect to the educational benefits of the G.I. Bill, "racial discrimination was commonplace

not accurate with respect to the housing provisions of the G.I. Bill.²⁴³ Because of the design and administration of the housing program created by the G.I. Bill, several groups of people were excluded from the veterans' housing program: female and non-white veterans were excluded for several decades, and all veterans who could not afford or did not desire homeownership have been excluded for the entire duration of the program, continuing to this date. Each of these groups is discussed below.

A. *The Exclusion of Women Veterans*

Although the proposed legislation was described as a bill of rights for G.I. Jane as well as G.I. Joe,²⁴⁴ the hundreds of thousands of women in the military²⁴⁵ did not use the veterans' housing programs to the same extent as men did²⁴⁶ and

... especially in the South”), *available at* <http://polisci.wisc.edu/~coleman/apd/mettler.pdf>; Mettler, *supra* note 5, at 353 (noting a scholarly suggestion “that veterans who took advantage of the G.I. Bill’s educational provisions were likely to have come from more privileged socioeconomic backgrounds than nonusers”); *id.* at 355 (noting that “considerable variation exists among both G.I. Bill users and nonusers in terms of level of education completed prior to military service”).

243. “Fifty-one percent of all returning veterans—7.8 million—took advantage of the educational benefits.” *Id.* at 351. By contrast, about 40% of World War II veterans “obtained their homes under VA guarantees or loans.” THE DOUGLAS COMM’N REPORT, *supra* note 96, at 103. “About 20 percent of the Korean servicemen . . . obtained such help.” *Id.* Today, about 1% of veterans use the guaranteed home mortgage loan program. *See* THE ENCYCLOPEDIA OF HOUSING, *supra* note 9; *see also* DVA, *Guaranteed Loans, Defaults and Claims, and Property Management, FY 1998-2001*, *supra* note 220 (indicating that the VA guaranteed 199,160 home mortgage loans in FY 2000 and 250,009 in FY 2001); CATALOG OF FEDERAL DOMESTIC ASSISTANCE, *supra* note 158, at 64.11 (In FY 2002, VA guaranteed loans for the purchase of 185,362 conventionally constructed homes and condominium units; the estimate for FY 2003 was 152,000 purchase loans.) Approximately 18.5 percent of these VA loans are made to service members on active duty. DVA OIG REPORT, *supra* note 202, at 1.

244. ROSS, *supra* note 24, at 99 (citing the N.Y. TIMES, Jan. 9, 1944).

245. *See* MAJ. GEN. JEANINE HOLM, U.S.A.F. (RET.), WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 100 (1982) (“At war’s end, of the 12 million people in the U.S. Armed Forces, nearly 280,000 were women.”).

246. *See* LIZABETH COHEN, A CONSUMER’S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 141 (2003) (noting that in the New York-Northeastern New Jersey Standard Metropolitan Area before 1956, women owned no VA-financed homes and that women owned a much smaller percentage of FHA-financed homes than of privately financed homes. “Whereas women owned 9.8 percent of all mortgaged owner-occupied properties and 12.6 percent of properties with conventional first mortgages (not government-insured), they only owned 8.5 percent of all government-insured first mortgages (FHA and VA combined) and, most revealing, no VA-insured homes”); *but see* MATTIE E. TREADWELL, THE WOMEN’S ARMY CORPS 738 (1953) (stating that “[f]ewer women than men were interested in loans to buy a home or to go into business,” but not indicating any basis for attributing the differential use of the program to relative lack of interest on the part of women).

did not have equal opportunities to do so.

The relative inability of women to use the housing program was due to several causes, some of which were unrelated to the focus on homeownership. Many women who served in various units associated with the military were not accorded veteran status after World War II.²⁴⁷ Moreover, even women who were accorded veteran status were less likely than men to secure benefits counseling from veterans' organizations and were, for other reasons, less likely to claim veterans' status.²⁴⁸ The limitation of the assistance to guaranteed home mortgage loans meant, however, that even women who did have veteran status and did seek to use the housing program would experience significant difficulty and differential treatment (less favorable than that accorded male veterans) because the program depended upon private lenders.

Private lenders in the 1940s, '50s, and '60s—and thereafter—discriminated against women who sought to borrow money, for home purchases or anything else.²⁴⁹ Women veterans who were married were treated less favorably than male veterans because the married women veterans' incomes were disregarded by lenders in determining whether and to what extent to make loans. Until 1968, "if a married woman veteran applied for a loan, her income was not considered among the criteria used to determine whether the couple was a sound credit risk. [S]he was seen as a working wife, [whose] . . . income was seen as supplemental and unstable."²⁵⁰

Women who had not themselves served in the military, but were the "widows of veterans[,] received fewer and poorer benefits than their husbands had received . . . until reforms began in the late 1950s."²⁵¹ The widowers of women veterans were treated less favorably than male veterans' widows. From 1950 until 1972, any widow of a male veteran who died in service or as a result of service-connected disabilities, who did not remarry, was eligible for a GI loan,²⁵² but "no provision was made for the widowers of female veterans."²⁵³

247. See WILLENZ, *supra* note 35, at 168-79 (discussing the status of the Women's Army Auxiliary Corp, later called the Women's Army Corps, and the Women's Air Force Service Pilots).

248. See COHEN, *supra* note 246, at 138-39.

249. This was one of the reasons for the 1974 amendment of the Fair Housing Act and the enactment of the Equal Credit Opportunity Act to prohibit discrimination on the basis of sex. The Federal Fair Housing Act of 1968 was amended in 1974 to prohibit discrimination on the basis of sex. Housing and Community Development Act of 1974, Pub. L. No. 93-383 § 808(b)(1), 88 Stat. 633, 729 (codified as amended at 42 U.S.C. § 3604 (2000)); Equal Credit Opportunity Act, Pub. L. No. 93-495, § 503, 88 Stat. 1500, 1521 (1974) (codified as amended at 15 U.S.C. § 1691(a) (2000)) (prohibiting discrimination by financial institutions on account of sex and marital status).

250. WILLENZ, *supra* note 35, at 194; see also COHEN, *supra* note 246, at 143; WRIGHT, *supra* note 51, at 268 (stating, in a book published in 1981, that "[b]anks . . . still discriminate against . . . working women").

251. COHEN, *supra* note 246, at 138.

252. WILLENZ, *supra* note 35, at 194; see REPORT ON VETERANS' BENEFITS, *supra* note 6, at 163.

253. WILLENZ, *supra* note 35, at 194. See *Frontiero v. Richardson*, 411 U.S. 677, 690-91

B. *The Exclusion of Veterans of Color*

From the time the veterans' housing programs were created, in 1944, for more than twenty years—well into the 1960s—VA (and FHA) housing benefits were, on the whole, available only to people who were white.²⁵⁴ “[L]ess than 2 per cent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to Negroes.”²⁵⁵ Moreover, housing financed by the VA (and FHA) was strictly segregated on the basis of race, so that the few such homes that were available to non-whites were in non-white neighborhoods.²⁵⁶

This limitation of non-whites' access to VA- and FHA-financed housing was accomplished in several ways. First, the VA and FHA²⁵⁷ required racial covenants until 1950, and allowed developers to use them thereafter.²⁵⁸ Second,

(1973) (holding unconstitutional federal statutes that allowed servicewomen to claim their husbands as dependents only if the husbands in fact depended upon the wives for over one-half of their support, while servicemen could claim their wives as dependents without showing any degree of actual dependence).

254. See R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY* 85-86 (2d ed. 1995) (“[T]hose aided [by the FHA and VA programs] were largely white middle or working class families with enough income to purchase the new suburban tract housing springing up around United States cities.”); COHEN, *supra* note 246, at 166-73 (discussing racial discrimination against black veterans); see also David H. Onkst, “*First a Negro . . . Incidentally a Veteran*”: *Black World War Two Veterans and the G.I. Bill of Rights in the Deep South, 1944-1948*, 31 J. SOC. HIST. 517, 519-20 (1998) (black veterans in Georgia, Alabama, and Mississippi rarely were able to secure VA-guaranteed loans).

255. GELFAND, *supra* note 58, at 221; see also *Jorman v. Veterans Admin.*, 830 F.2d 1420, 1422-23 (7th Cir. 1987) (noting that it was not until 1968 that “the VA ceased excluding inner-city areas from those in which it would guarantee mortgages for qualified veterans” and attributing this change to “pressure from civil rights groups to encourage the use of [the VA] loan program by minorities in the inner city”).

256. The few non-white developments generally were in the South. See CHRISTOPHER SILVER & JOHN V. MOESER, *THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940-1968*, at 9 (1995) (noting that in Atlanta, Memphis, and Richmond, cities with relatively large black populations, “the planning process took into account the future expansion needs of blacks”); *id.* at 125 (“In all three cities expansion of the public planning function in the 1940s aimed both at stabilizing an increasingly volatile racial situation and at speeding the process of neighborhood separation by class and race.”); THOMAS W. HANCHETT, *SORTING OUT THE NEW SOUTH CITY: RACE, CLASS, AND URBAN DEVELOPMENT IN CHARLOTTE, 1875-1975*, at 235-36 (1998) (In Charlotte, in “a concerted policy on the part of the city’s white leaders, in association with the FHA . . . real estate developers in Southern cities typically built houses for black buyers on the suburban fringe.”); *id.* at 330 n.4 (“[B]y offering opportunities in one specified sector, developers met FHA requirements to protect their subdivisions elsewhere from the threat of invasion by nonwhites.”).

257. See JACKSON, *supra* note 53, at 204 (the VA “very largely followed FHA procedures and attitudes”).

258. See Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley*

even where developers might be willing to sell homes to minorities, lenders discriminated on the basis of race and ethnicity.²⁵⁹ Third, even if developers and lenders might be willing to allow purchases by non-whites, neighborhood forces often used violence to prevent non-white families from buying or occupying housing in neighborhoods that had been identified as “white.”²⁶⁰

Although racial discrimination in the sale and financing of housing was made illegal by the Civil Rights Act of 1968,²⁶¹ racial discrimination and segregation continue to be practiced by many sellers, lenders, brokers, insurers, neighbors, and others involved in home sales.²⁶² Although VA and FHA loans today are

and Brown, in *FROM TENEMENTS TO THE TAYLOR HOMES*, *supra* note 49, at 206, 209, 213; *see also* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 474 (Bantam Books 1968) (Mar. 1, 1968) (“Until 1949, FHA official policy was to refuse to insure any unsegregated housing.”).

259. *See* AARON, *supra* note 101, at 81 (“all lenders use rules of thumb for choosing among loan applicants: borrowers must have steady employment; monthly payments may not exceed a stipulated fraction of family income; blacks, Spanish-Americans, and Indians need not apply; loans in certain neighborhoods will not be approved”).

260. *See* Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 335 (2001) (reviewing STEPHEN GRANT MEYER, *AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000)); United Negro & Allied Veterans, *supra* note 120, at 2-3 (“Because of restrictive covenants, backed up in many instances by the application of outright terror in which a combination of real estate interests, police and politicians play a united role, [nonwhite veterans] are relegated to Jim Crow Ghetto areas by force.”).

261. Civil Rights Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. § 3601 (2000)); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968) (holding that the Civil Rights Act of 1866 prohibits racial discrimination in sales or rentals of real property). President Kennedy’s 1962 Exec. Order No. 11,063, 27 Fed. Reg. 11527 (Nov. 24, 1962), did not apply to FHA and VA financed housing but did ask that agencies like FHA and VA insure that their financial assistance programs would not be used to create racially separate housing facilities. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 3:4 (1996). Title VI of the Civil Rights Act of 1964 barred discrimination on the basis of race in programs receiving federal financial assistance, but excluded any “contract of insurance or guaranty.” Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252 (codified as 42 U.S.C. § 2000d-1 (2000)). *See* David M.P. Freund, “Democracy’s Unfinished Business”: Federal Policy and the Search for Fair Housing, 1961-1968, Report to the Poverty and Race Research Action Council, at 4 (May 9, 2004) (stating that in 1967 “an internal FHA investigation revealed what realtors and home buyers alike had long recognized, that the agency continued to deny mortgage insurance to most non-whites, in defiance of the Executive Order”), *available at* <http://www.prrac.org/pdf/freund.pdf>; *id.* at 54-55 (discussing 1967 opposition to fair housing legislation by NAREB and others and stating that from 1965-1967, “numerous efforts to secure open housing for minority servicemen were unsuccessful”); *see also* SHERIE MERSHON & STEVEN SCHLOSSMAN, *FOXHOLES & COLOR LINES: DESEGREGATING THE U.S. ARMED FORCES* 275, 285, 290 (1998) (As late as 1967, racial discrimination against Black service members was documented in Maryland.).

262. *See, e.g.*, MARGERY AUSTIN TURNER ET AL., *THE URBAN INSTITUTE, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000*, at 3-10 to 3-19

made to minorities, racial discrimination and segregation undoubtedly continue with respect to VA- and FHA-financed homes as they do with respect to all housing.²⁶³

The overt, *de jure* racial discrimination that characterized the first two decades of the VA program meant that even those non-white veterans who had the financial capacity to utilize the program were precluded from doing so. (In addition, non-white families were disproportionately too poor to use the homeownership programs, a subject discussed *infra*).²⁶⁴

The exclusion of non-white veterans from the VA housing program has had significant and continuing effects on people and places. With respect to financial consequences for individuals, those programs laid the basis for substantial wealth accumulation and class mobility for those who were able to use them. Discrimination against non-whites in the VA and FHA homeownership programs meant, as Melvin Oliver and Thomas Shapiro wrote, that veterans of color were almost entirely “[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history.”²⁶⁵ Since the VA and FHA loans were made only in racially segregated neighborhoods, even the few non-whites who were able to secure VA and FHA loans had homes that were in predominantly minority communities where property values usually were lower and appreciated more slowly than in comparable white neighborhoods.²⁶⁶ And the non-whites who were financially capable of homeownership but were excluded from the VA and FHA programs because of their race had fewer options than did whites. They were barred from much private sales and rental housing because of their race, and they would likely be barred also from public housing, because it had maximum as well as minimum income requirements.²⁶⁷

(Nov. 2002) (showing differential treatment favoring whites over Blacks and Hispanics in home sales), *available at* http://www.huduser.org/publications/pdf/phase1_report.pdf.

263. *See id.*

264. *See infra* notes 275-77, 280 and accompanying text.

265. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995); *see also* HAYS, *supra* note 254, 85-86.

266. *See* Franklin D. Wilson & Roger B. Hammer, *Ethnic Residential Segregation and Its Consequences*, in *URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES* 272, 294 (Alice O'Connor et al. eds., 2001) (Blacks and Hispanics pay a price for living in ethnically homogeneous neighborhoods); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 *IND. L. REV.* 1199, 1205-07 (2001) (“both blacks and whites are penalized for living in neighborhoods that are more heavily black”); OLIVER & SHAPIRO, *supra* note 265, at 8 (“We found that the great rise in housing values is color-coded. Why should the mean value of the average white home appreciate at a dramatically higher rate than the average black home?”); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED* 38 (1999) (“[h]ousing in black neighborhoods has a lower rate of value increase (and in some cases may decrease in worth) when contrasted to similar units in predominantly white neighborhoods”); THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN-AMERICAN* 59, 119-25 (2004).

267. *See, e.g.*, RADFORD, *supra* note 49, at 190 (public housing “excluded all but the lowest income groups”); *see also* LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A*

Exclusion from the VA homeownership program often meant not only exclusion from an important opportunity to increase one's assets, but also exclusion from the suburbs, where superior educational, employment, and other opportunities flourished.²⁶⁸ The effects on these communities have been long-lasting. In the late 1990s, for example, Levittown, New York, from which non-whites were openly excluded for decades, still had a black population of less than one percent.²⁶⁹

These concrete consequences were not the only results of the focus on homeownership and the racial discrimination. Policy design and administration have not only "resource," but also "interpretive" effects, which "may shape beneficiaries' subjective experience of what it means to be a citizen . . .[,] may affect the formation of political identity . . .[,] and . . . may unify or stratify society and the political community in new and different ways."²⁷⁰ Suzanne Mettler, studying the G.I. Bill's educational provisions, presents evidence that "program design, featuring universal eligibility and routinized procedures, may have bestowed dignity . . . by including all veterans on an equal basis rather than stigmatizing less advantaged citizens."²⁷¹ She finds that "[t]he absence of invasive procedures and the universality of coverage elevated the status of less privileged beneficiaries, rather than stigmatizing them in the manner associated with targeted programs for the poor."²⁷² It would be instructive to study the "interpretive effects" on non-white veterans of the knowledge that their white counterparts received home mortgage assistance that was not available to them. Anecdotal material suggests what the result of such a study might be. For example, in 1997, on the fiftieth anniversary of the creation of Levittown on Long Island, New York, the *New York Times* reported the reaction of Mr. Eugene Burnett, a retired Suffolk county police sergeant "who was among thousands of military veterans" who sought housing in Levittown "[b]ut . . . was turned away because he is black."²⁷³ Fifty years later, Mr. Burnett said "he still stings from 'the feeling of rejection on that long ride back to Harlem.'"²⁷⁴

CENTURY OF FRUSTRATION 133 (1978) ("[f]ederal law requires over-income tenants to be evicted unless 'special circumstances' make alternative housing unavailable") (citing 42 U.S.C. §1410(g)(2),(3)).

268. See JACKSON, *supra* note 53, at 215-16 (discussing FHA and VA concentration in suburban locations).

269. See Paula Span, *Mr. Levitt's Neighborhood: After 50 Years, It Still Offers the Good Life—for Some*, WASH. POST, May 27, 1997, at C1.

270. Mettler, *supra* note 5, at 352 (citing ANNE SCHNEIDER & HELEN INGRAM, POLICY DESIGN FOR DEMOCRACY 78-89, 140-45 (1997)).

271. *Id.* at 359-60.

272. *Id.* at 360.

273. Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. TIMES, Dec. 28, 1997, § 1, at 23.

274. *Id.*

C. The Exclusion of Veterans Who Do Not Choose, or Cannot Afford, Homeownership

As discussed above, “there are people who prefer, or whose circumstances make it advisable for them, to rent rather than to own their living quarters.”²⁷⁵ These include

those whose present financial position is good but whose future is not assured, those who have been unable or do not wish to save, those who wish to invest their savings in other ways, those whose place of employment is likely to change, those whose occupation demands frequent absences from home or a central urban location, those who are old and who do not wish the responsibility of a home of their own, and those who are young and need only small quarters.²⁷⁶

In addition, although VA (and FHA) assistance brought homeownership within the reach of households with income and wealth levels lower than those required for conventional financing of new homes, homeownership still was too expensive for many veterans.²⁷⁷

275. See *supra* note 106 and accompanying text.

276. THE CONTINUING PROBLEM, *supra* note 105, at 3. With respect to the advantages of rental for those who require mobility, see Rohe et al., *supra* note 204, at 391-94 (discussing ways in which homeownership restricts individual mobility); Steven Hornburg, *Introduction*, in LOW-INCOME HOMEOWNERSHIP, *supra* note 203, at 375, 379 (stating that “[w]e . . . need a better understanding of the downside risk of homeownership, such as the social costs of default and the loss of mobility”).

277. See DAVIES, *supra* note 102, at 117 (The FHA program “supposedly helped families with incomes in the upper-most third to purchase houses.”); LEVITAN & ZICKLER, *supra* note 23, at 86 (“predominantly middle-income veterans” participate in the program); WENDT, *supra* note 96, at 183 (A study of home loans guaranteed by the VA in 1954 and 1955 showed that more than half “were to veterans with incomes between \$300 and \$499 per month, while only between 3 and 4 per cent . . . were to those with incomes below \$300 per month.”); see also *id.* at 209 (concluding that “[t]he evidence would seem to demonstrate that small percentages of low-income families were borrowers under federal loan programs”); *id.* at 215 (noting that “for many of these homeownership is not practical”); *id.* at 214 (“[F]ederal mortgage insurance programs have not specifically met the needs of the families most in need of housing.”); see also THE DOUGLAS COMM’N REPORT, *supra* note 96, at 104 (noting that although the VA did not serve the “very lowest income group,” “the VA apparently reached further down the income scale than did FHA”). Furthermore, even those lower-income households that could afford homeownership were more likely to use conventional mortgages than either FHA or VA mortgages, in part because those purchasers would be more likely to purchase “lower priced, older home[s],” many of which “fail[ed] to meet minimum construction requirements of FHA and VA.” WENDT, *supra* note 96, at 209.

See also United Negro & Allied Veterans, *supra* note 120, at 3. The United Negro and Allied Veterans of America reported to the National Veterans Housing Conference in 1948 that “[w]e must have a major portion of this comprehensive housing program consist of rental housing.” *Id.* at 3. This was based on a 1946 survey by the Housing and Home Finance Agency that showed that,

With the exception of the veterans served by the HCHV, DCHV, and HUD-VASH programs, the VA offers no housing assistance to the millions of veterans who cannot afford or do not want homeownership. The VA program, like the FHA program, provides a relatively shallow subsidy.²⁷⁸ To make homeownership feasible for households with significantly lower incomes and asset levels, the government would have to provide a deeper subsidy, as it has in DoA and HUD programs.²⁷⁹ The government's failure to do so meant that "the very lowest income group has been largely left out, since its members are unable to meet the costs of interest and amortization."²⁸⁰ This lowest-income, lowest-asset group of

in the South, "[o]nly 51 percent of Negro veterans who were married when they were discharged, had their own homes or apartments, compared to 70 percent of the white veterans." *Id.* at 1. The surveys

showed that over half of all married Negro veterans in the South were living doubled-up or in rented rooms, tourist cabins or trailers, and almost half of them were living in this manner in the North. . . . In the Southern areas, about 40 percent were living in substandard dwelling units and in the Northern areas, about 30 percent were living in such unhealthful conditions.

Id. at 2.

278. See WENDT, *supra* note 96, at 188 (reporting a study that found that the VA program made homeownership possible for many who could not have purchased homes "if down payments had not been reduced or eliminated through the veterans' home loan program") (quoting Daniel B. Rathbun, *The Veterans' Home-Loan Program: Success or Failure?*, APPRAISAL J. 408 (July 1954)); see also AARON, *supra* note 101, at 80, 90.

279. A deeper subsidy is provided by the Department of Agriculture's interest credit program, which is available for both homeownership and rental housing. Housing Act of 1949, § 521, 42 U.S.C. § 1490a(1) (2000). See TENANTS' AND PURCHASERS' RIGHTS, *supra* note 198, at 1/13, 1/18. DoA also offers a self-help program for those "who do not have sufficient income to qualify for a loan for a house constructed entirely by a contractor." See *id.* at 1/20. The HUD Section 235 program provided a deeper subsidy for homeownership, and the Section 221(d)(3), Section 236, and Section 8 programs offered deeper subsidies for rental and homeownership. See NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, at 1/23, 1/25, 1/27 (2d ed. 1994); HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 107-17 (1974) (discussing §§ 235 and 236); HDR, *supra* note 157, §§ 3:1 to 3:124 (discussing § 8).

280. THE DOUGLAS COMM'N REPORT, *supra* note 96, at 104; see also *id.*, Table 7, "Distribution of VA Mortgages by Income Category" (showing the percent of VA mortgages taken out in 1966, with the highest percentage (31%) going to the highest income category, and the lowest percentages (1.6 and 15.4%) going to households with the two lowest levels of income)

While most of the low-income households in the United States are white, the exclusion of lower-income veterans was disproportionately pertinent to non-white veterans, whose incomes and wealth, then as now, were significantly lower than the income and wealth of white veterans. See WENDT, *supra* note 96, at 214 ("[M]ore than four million nonwhite families reported a median income in 1957 of \$2,764, approximately half that for white families These data suggest that a large proportion, probably above 75 per cent, of these families that in terms of income class are in the lowest one-fifth in the United States . . . cannot be served on any extensive basis by existing federal mortgage loan insurance programs designed to aid in promoting homeownership. Indeed,

veterans is likely to include many veterans with disabilities, since people with disabilities are disproportionately likely to be poor.²⁸¹

Although institutional discrimination against women and non-white veterans has been unlawful for decades, the twenty-first century begins with the continuation of the VA's institutional discrimination against low income/low asset households and others for whom homeownership is infeasible. Except for the very few veterans who are served by the HCHV, DCHV, and HUD-VASH programs, the VA provides no housing assistance to veterans who cannot access homeownership because of low income or assets. The need for a subsidized rental program for veterans, recognized in the 1940s, continues in the twenty-first century.

[P]ublic policy should not disproportionately promote homeownership at the expense of important investments in affordable rental housing. Rental housing remains the housing of first and last resort for many Americans. More important, rental housing is an appropriate housing

the data suggest that it is unrealistic to expect that large numbers of families in the lowest income group would be homeowners.”); *see also* United Negro & Allied Veterans, *supra* note 120, at 2 (The HHFA surveys showed that “the median sales price of new homes constructed in 1946 was about \$7,500. Yet, Negro veterans indicated in these surveys that they could afford to pay median prices of \$3,600 in the South and \$5,400 in the North.” Veterans of color “form the great bulk of veterans in the lowest income levels.”); *id.* at 4 (citing a report from the American Federation of Labor “showing that average weekly income of white veterans ranges from 30 to 78 percent above the average for Negro veterans throughout the South, and giving as an example Jackson, Mississippi, where the average weekly wage for white veterans is \$48 while Negro veterans average \$27 per week”). For late twentieth century measures, see OLIVER & SHAPIRO, *supra* note 266, at 7; WILLIAM A. DARITY & SAMUEL K. MYERS, JR., *PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945*, at 136 (1998).

281. *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 9 (2004) (“[D]isability and poverty are closely intertwined: Disability is a frequent cause of poverty, and living in poverty often causes or exacerbates disabling conditions.”); *see also* Robert A. Rosenheck et al., *Outcomes After Initial Receipt of Social Security Benefits Among Homeless Veterans with Mental Illness*, 51 PSYCHIATRIC SERVS. 1549, 1554 (2000) (finding that for veterans who received SSI (Supplemental Security Income), SSDI (Social Security Disability Income) or veterans’ benefits, the average total annual income was pitifully small: \$8820, “about half the amount defined as poverty level”). Beneficiaries’ incomes, of course, are greater than non-beneficiaries’ incomes. *Id.* (“[T]hree months after the benefit decision . . . the average total income of beneficiaries was 1.6 times that of nonbeneficiaries.”). Rosenheck and his co-authors also found that those whose applications for benefits were granted “were not significantly different from nonrecipients on any health status measure.” *Id.* at 1553. The only significant difference between those whose applications were approved and those whose applications were denied seemed to be “patience—a willingness to carefully and thoroughly proceed through the various steps required to obtain benefits.” *Id.* at 1553-54. “Clients who are impulsive, impatient, or disorganized may be less willing to follow the procedures necessary to obtain benefits, even though they are severely disabled.” *Id.* at 1554.

choice for many, based on life cycle, employment, or just life-style preference.²⁸²

As Henry Aaron wrote in 1972, "[t]he implicit subsidy through VA loan guarantees . . . presumably rests on a desire to make partial financial amends to men who served in a socially useful, but underpaid, occupation. Why veterans who own their residences deserve such a subsidy, while those who rent do not, is far from clear."²⁸³

III. REASONS WHY VETERANS HAVE BEEN OFFERED ONLY HOMEOWNERSHIP SINCE WORLD WAR II

Parts I and II described the development of the veterans' housing programs and the consequences of the concentration on homeownership. This Part considers some of the reasons for the focus on homeownership as a basis for Part IV's discussion of proposals for changing the policies governing veterans' housing.

As we have seen, there was a severe housing crisis in the late 1940s and early 1950s, particularly for people with the lowest income and asset levels, people who needed help in securing rental housing.²⁸⁴ There was a powerful public demand for action on housing, and President Roosevelt expressed support for the principle that all people should enjoy "Freedom from Want," a freedom that would include access to housing.²⁸⁵ The Truman administration strongly supported programs of rental as well as homeownership assistance.²⁸⁶

As we also have seen, the Roosevelt administration favored universal programs. FDR had opposed special programs for veterans, insisting that "the fact of wearing a uniform does not mean that he can demand and receive from his government a benefit which no other citizen receives."²⁸⁷ At the end of World War II, FDR's administration introduced special programs for veterans only to the extent it thought necessary to avoid social disruption.²⁸⁸

In the face of this universal need for assistance with rental as well as homeownership, strong public demand that the need be satisfied, and some support within the administration for such satisfaction, the federal government produced a program that served veterans only, not civilians, and served only some veterans—almost exclusively white men, and exclusively those who could afford and desired homeownership. It is essential that we try to understand the forces that created and maintain this limited program in order to consider ways of expanding housing assistance.

The principal forces that prevailed were the veterans' organizations, fiscal

282. Hornburg, *supra* note 276, at 379.

283. AARON, *supra* note 101, at 90.

284. See *supra* notes 102-06 and accompanying text.

285. See *supra* note 14 and accompanying text.

286. See *supra* notes 107, 121, 141-46 and accompanying text.

287. See *supra* note 64 and accompanying text.

288. See *supra* notes 63-73 and accompanying text.

and political conservatives, and the lending and real estate industries. The veterans' groups were committed to the principle of veterans' exclusiveness: they insisted on programs that were administered by the VA, rather than programs that were administered by agencies that served the public at large and treated veterans as part of that general public. Their determination that the needs of veterans be met separately was supported by conservatives, who "feared the use of the 'veterans' appeal as a guise to obtain general liberal reforms."²⁸⁹ Fiscal conservatives wanted to spend as little money as possible, and therefore were relieved to be able to draw a line at helping veterans and not including the general public. Political conservatives—sometimes the same people—wanted to keep government involvement as slight as possible, and distinguished between government provision for veterans (often seen as repaying an obligation) and government assistance to the general public (often seen as socialism). Social conservatives also had some concern to deflect anger and hostility on the part of returning veterans.²⁹⁰ The combination of these forces secured a veterans-only housing program.

Given that the program would be one that would serve veterans only, the fascinating questions were why and how the decision was made to create a program limited to guaranteeing homeownership loans—a program that would exclude many veterans: women, non-whites, and others who could not satisfy private credit institutions, and all those veterans who could not afford (or did not want) homeownership.²⁹¹ The answer seems to be that this limitation, too, served

289. ROSS, *supra* note 24, at 43 (quoting Congressman Bertrand W. Gearhard (R-Cal.), "a founder of the American Legion, a past commander of his department, and a former National Executive Committee member," who said that "[t]he thing we have to fight down is the crafty effort of so many different groups to use the war for the reorganization of the world after the war; to capitalize upon the war sentiment to accomplish their objectives which have to do with social uplift"; Ross describes Congressman Rankin as a member "of a wrecking team in Congress that hoped to demolish the remaining vestiges of the New Deal"); *id.* at 74-77 (describing the support provided by the American Legion and the Veterans of Foreign Wars (VFW) to Rankin's effort to have all veterans' legislation assigned to the World War Veterans' Legislation Committee, which he chaired, and stating that part of the Legion's explanation for supporting Rankin, as set out by the Legion's Ohio Department Commander, was "so that crack-pots, long-haired professors, and radicals will have as little ground as possible to work on in an effort they will undoubtedly make to influence the thinking of today's discharged Army") (quoting Coffee to Vorys, July 15, 1943); *id.* at 80 (William Randolph Hearst, who long had "dictated a rabid anti-New Deal policy for his [national] newspaper chain," also strongly supported the Legion.); *id.* at 79 n.38 (discussing work of Hearst correspondent); *see id.* at 39-49 (discussing the successful opposition of veterans' organizations and conservatives to efforts to provide job training for all handicapped people, including, but not limited to, veterans); *id.* at 57 (discussing the concern about using "veterans' benefits as a lever for broader domestic policy reforms—a characteristic of most of the later New Deal-Fair Deal veterans' programs").

290. *See supra* note 72 and accompanying text.

291. The G.I. Bill was rooted in a desire to benefit veterans, but it would be a mistake to believe either that such a desire alone is enough to produce any benefit to any veterans or that such

the varied interests of different groups with political power: the veterans' organizations, the lending and real estate industries, and fiscal, political, and social conservatives.

A. The Interests of Veterans and Veterans' Advocates

Although veterans were of all genders, races, ethnicities, abilities, and economic classes, the organizations that represented veterans focused on some but not all portions of the veteran population. While all of these organizations supported the principle of veterans' exclusiveness, all of the organizations did not agree about which veterans should be served by federal programs.²⁹² The Disabled Veterans of America, for example, "doggedly opposed the GI Bill of Rights throughout the entire course of its legislative history,"²⁹³ maintaining that it would divert "needed funds and facilities from the disabled."²⁹⁴ Other veterans' organizations had other ideas about which veterans should benefit from federal assistance in which ways.²⁹⁵

The American Legion, the principal advocate for the G.I. Bill and its housing program, purported to represent all veterans, but, in fact, was less representative of women, non-whites, and those with lower incomes.²⁹⁶ Many more Legion

a desire necessarily will produce benefits to all veterans or to veterans only. See JOHN DOLING, *COMPARATIVE HOUSING POLICY* 10 (1997) ("Governments may intervene . . . in ways that improve the lot of those who would not otherwise be able to consume housing of a reasonable size and quality, but such an outcome is a consequence of an underlying motivation to preserve the social order."). Cf. KELLY, *supra* note 5, at 3, 67 (stating that "[t]he violence and scale of the Civil War . . . created a large population of war-disabled veterans and forced the postwar Congress to establish a comprehensive system of veterans' institutional care," and that "in the immediate postwar months the disturbing sight of battle-scarred soldiers begging in the streets of Northern cities once again forced the issue of veterans' institutional care onto the public agenda"). In the late twentieth century, "a large population of war-disabled veterans" has not "forced" Congress to establish "a comprehensive system of veterans' institutional care," and the "sight of battle-scarred soldiers begging in the streets of Northern" (and Southern and Western) cities has not "forced the issue of veterans' institutional care onto the public agenda."

292. See ROSS, *supra* note 24, at 105.

293. *Id.* at 103.

294. *Id.* at 104. This objection seems to have proven true with respect to the housing program, as veterans with disabilities likely are disproportionately too poor to afford homeownership.

295. See *id.* (noting that the Disabled Veterans of America, Veterans of Foreign Wars, Military Order of Purple Heart, and Regular Veterans Association proposed alternatives to the G.I. Bill—without success).

296. See WECTER, *supra* note 32, at 444 (writing of the Legion in 1944: "as statistics showed, the prosperous rather than the unprosperous veteran kept up his Legion membership through the years"); MOLEY, *supra* note 44, at 134 (stating that "[i]n the early 1920's [sic] the Legion despaired of assimilating certain nationalities"); *id.* at 134-35 (discussing the Legion's concern about the "Oriental races"); *id.* at 177 (the Legion opposed increased immigration from China); *id.* at 148, 322-23 (discussing "The Forty and Eight," a "fun-making" group associated with the Legion. The

group's "rules excluded the colored and Oriental races from its membership." This "became intolerable" to the Legion in 1960, when "the Legion severed its relations with the Forty and Eight and disavowed the organization"); WILLIAM PENCAK, *FOR GOD AND COUNTRY: THE AMERICAN LEGION, 1919-1941*, at 68 (1989) ("From the beginning, the Legion did not know what to do with black veterans."); *id.* at 99 (describing the 1927 "Pilgrimage" to Paris, for which "[t]he Legion travel bureau had refused to accept reservations from black veterans").

Some blacks did join the segregated posts adopted throughout much of the nation. Northern black veterans usually formed their own posts without incident in communities with substantial black populations. . . . But most blacks had little enthusiasm for an organization that had no greater commitment to equality than American society as a whole.

Id. at 69. As late as the 1940s, when the G.I. Bill was drafted, the American Legion allowed its state departments to confine African-American members to separate posts and to limit severely the number of posts for African-Americans. *See id.* at 68-69 (while some white Southerners in the Legion wanted "separate but equal" posts, others were concerned that if black veterans were admitted to membership in the Legion, "they would have to be allowed to vote in the Legion, even though they could not vote in general elections" and "they would dominate their states by sheer numbers Rather than lose Southern whites, Northern supporters of black equality allowed each state to reach its own racial solution"); *id.* at 198 (Arkansas barred black posts altogether); *see also* *Chapman v. The American Legion*, 14 So. 2d 225, 228 (Ala. 1943) (upholding dismissal of a suit brought by "Negro" veterans of World War I who sought to have the American Legion establish, in Birmingham, Ala., a post for African-American veterans). The petitioners alleged that Alabama had more than 125 posts "whose membership is composed exclusively to that of White World War Veterans of World War One; [and] that there is only ONE American Legion Post Chartered and established within the entire State of Alabama, where Negro Veterans of World War One are privileged [sic] to apply for and be elected to membership"—the Britton McKenzie Post #150 in Tuskeega, Ala.. *See* Record at 5, *Chapman* (No. 6815-x). The petitioning veterans said expressly they are not interested in, nor do they want to be and become members in any of said posts now chartered and established in Alabama, whose membership therein is composed entirely of white world war veterans; nor or [are] they interested in, nor do they want social equality with said white veterans . . . that they are only interested in their lawful rights . . . to have issued a charter for the establishment of a . . . American Legion Post in . . . Birmingham for the benefit of . . . qualified negro veterans residing [there].

Id. at 12. The petition also refers to a plan in North Carolina, where the American Legion had established a "separate department for Negroes." *Id.* at 7.

It is worth noting that counsel for the American Legion in this case included Richard T. Rives, whose subsequent career on the U.S. Court of Appeals for the Fifth Circuit made him a hero in the civil rights movement. *See* JACK BASS, *UNLIKELY HEROES* 69-73 (1981) (discussing the development of Rives' views on racial issues).

Other Legion positions were affected by racial considerations. *See, e.g.,* PENCAK, *supra*, at 198 (stating that part of the Legion's vacillation and internal disagreement with respect to the question of a "bonus" had to do with racial concerns: "[i]n the South, especially, Legionnaires feared the effects of unprecedented amounts of cash placed in the hands of black veterans, who for the most part were sharecroppers locked into a system of debt dependency"); *id.* at 286 (discussing

members were men than women, white than non-white, financially comfortable than poor. Thus, it is not altogether surprising that the Legion proposed a housing program that excluded all veterans who could not afford or did not want homeownership, which necessarily meant a disproportionate exclusion of women and non-whites. (Although the use of the private market to make guaranteed loans—and the private market's hostility to women and non-whites—was not part of the Legion's original proposal, which contemplated direct loans made by a government agency, the government itself at that time practiced housing and lending discrimination against non-whites and women.²⁹⁷)

B. The Interests of the Real Estate, Lending, Construction, Lumber, and Related Industries and Fiscal, Political, and Social Conservatives

The real estate, lending, construction, lumber, and related industries had a powerful interest in programs that promoted new housing development. Lenders and brokers had a particular interest in promoting private, single family homeownership, which would produce additional business for them.²⁹⁸ Just as the industries' interests led to the creation of the FHA homeownership program and the evisceration of the public housing program,²⁹⁹ the industries' interests shaped the veterans' housing program.³⁰⁰

The industries' self-interest was buttressed by the ideological commitment of fiscal, political, and social conservatives, often but not always the same people as the industry actors, who also had strong preferences for homeownership programs. Fiscal conservatives preferred homeownership because it seemed to

"racial troubles, . . . [the] most serious problem" with the Legion's program of Junior Baseball).

In other respects, at least where there was no disadvantage to the organization in doing so, the Legion did advance the interests of non-white veterans. *See, e.g., id.* at 195-96 (discussing a Legion field representative's 1933 protests against review boards that disallowed or reduced benefits for presumptively service-connected disabilities. The representative "noted that the 'colored boys' in the South fared the worst: only 10 percent retained their benefits").

For a discussion of the continuance of American Legion racial segregation, see Pat Arnow, *The Old South: For Some Black Veterans, Segregation Lingers on*, in *IN THESE TIMES* (Mar. 21, 1999) (on file with author).

297. The FHA "insisted on the application of racially restrictive covenants to properties that sought government assistance" until 1948, following the Supreme Court's decisions in *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Hurd v. Hodge*, 334 U.S. 24 (1948), and allowed the use of such covenants after 1950. Hirsch, *supra* note 258, at 209, 213; *see also supra* notes 251-53 and accompanying text.

298. *See FUNIGIELLO, supra* note 62, at 249 ("Mortgage bankers and builders, with an eye on returning veterans as a house-hungry group eager to buy whatever they produced, resisted any proposals that might retard the pace of construction or lower their profits.").

299. *See supra* notes 54-62, 98-101, 133-37 and accompanying text.

300. The industries also built on the desire for programs that would increase employment opportunities, although production of subsidized rental housing also would have created employment opportunities.

cost relatively little government money,³⁰¹ and political and social conservatives preferred homeownership to other housing programs which seemed “Communistic.”³⁰²

It was the combination of all of these interests that created the G.I. Bill housing program enacted by Congress in 1944.³⁰³ The fiscal, political, and social conservatives and the industries wanted a homeownership program. The American Legion was disposed to accept that, partly because the Legion itself was a conservative organization,³⁰⁴ partly because it had developed the housing provisions of the G.I. Bill with the advice of representatives of the real estate industry,³⁰⁵ and partly because its constituency was more the higher-income than the lower-income veterans.³⁰⁶ The Congress that enacted the G.I. Bill in 1944 was a conservative institution.³⁰⁷ Indeed, it was conservatives in Congress who changed the American Legion’s original proposal for direct loans into a program of guaranteed loans and increased the interest rate on those loans.³⁰⁸

The G.I. Bill’s homeownership program was enacted because it served the interests of the industries and fiscal, political, and social conservatives, and the interests of some of the veterans—white, male veterans—with whom the American Legion was most concerned. By satisfying the needs of a large, politically powerful, group of veterans—those who could afford homeownership—Congress “took the edge off” the demand for housing assistance, even though the G.I. Bill left other veterans without housing help.

301. See REPORT ON VETERANS’ BENEFITS, *supra* note 6, at 161 (“In a way, the loan guaranty program was advanced as an alternative device to a cash bonus, advocated because it would be vastly less expensive to the Government, and because quite probably it would serve the needs of the veterans equally well.”); *but see generally* KEMENY, *supra* note 133 at 6, 25, 36-37 (arguing that homeownership is more expensive for governments as well as for households).

302. See DAVIES, *supra* note 102, at 41; *see also supra* notes 135-36 and accompanying text.

303. With regard to this general principle, see DOLING, *supra* note 291, at 45 (“Policy may have stated aims to assist specified groups in the population in specified ways, but the groups in the population that actually do benefit may be different than those apparently intended.”).

304. See WECTER, *supra* note 32, at 427-29; *see also* GEORGE SEAY WHEAT, THE STORY OF THE AMERICAN LEGION: THE BIRTH OF THE LEGION 81-92 (1919); DUFFIELD, KING LEGION 9, 156-235 (1931); *supra* notes 296-97 and accompanying text.

305. See *supra* note 99 and accompanying text.

306. See *supra* note 296 and accompanying text. The Legion’s lack of concern with veterans who could not afford homeownership was shown also by its opposition to the Wagner-Ellender-Taft Act. See *supra* note 137 and accompanying text.

307. See FUNIGIELLO, *supra* note 62, at 221, 244; Amenta & Skocpol, *supra* note 22, at 111 (noting that “[a]fter the 1942 elections, the conservatives in Congress were strong enough to roll back the New Deal By 1943 . . . Congress had claimed the initiative in questions of reconstruction Congressional planning committees were so weighted by conservatives that a Republican, Robert Taft, was named to head one key Senate subcommittee”).

308. See *supra* notes 86-92 and accompanying text. It was the conservatives, too, who undermined the subsidized rental program that the Administration sought as a supplement to the VA homeownership program. See *supra* notes 121-48 and accompanying text.

The enactment of the G.I. Bill sometimes is presented as an exception to a general retrenchment in social welfare policies.³⁰⁹ The analysis in this Article suggests, however, that the housing provision of the G.I. Bill was perfectly compatible with the general retrenchment in social welfare policies.³¹⁰ By enacting the homeownership program, Congress provided “cover” for a conservative force, by offering a little to satisfy a politically potent group, and thus deflecting the impetus for broader public programs for all, or at least for all veterans.

IV. AN INITIAL PROPOSAL OF SOLUTIONS

This review of the development of the veterans’ housing programs illuminates three problems: (1) save for the tiny HUD-VASH program, there is no subsidized rental program for veterans; (2) the existing homeownership program does not work well even for many veterans who choose homeownership; and (3) although the early discrimination against female and minority veterans may have ended, no redress ever was provided for the veterans who were its victims.³¹¹ The review also suggests some actions that might help to solve those problems. Although a great deal has changed since 1944, some of the forces that produced the limited housing provisions of the G.I. Bill—the lending, real estate, and related industries; and fiscal, political, and social conservatives—still have

309. See, e.g., Amenta & Skocpol, *supra* note 22, at 82; *id.* at 118 (“Conservative coalitions that opposed other strong federal measures collapsed on the issue of generosity towards veterans. Conservatives . . . could not resist veterans’ lobbying groups, especially the American Legion, which was locally organized throughout the nation and actively appealed to wartime sentiments favoring soldiers.”); THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES, *supra* note 22, at 33 (“both interagency rivalries and the leverage of congressional conservatives proved insuperable obstacles . . . except for such measures as veterans’ benefits”).

310. This would be consistent with the G.I. Bill’s conservative origins, as described by a journalist who celebrates the Bill. See BENNETT, *supra* note 72, at 3 (describing the law as being “written hurriedly in a hotel room by a former American Legion national commander, supported editorially by the most widely circulated—but least respectable—newspaper chain in the country, and sponsored primarily by an isolationist senator from the Midwest, a racist congressman from the South, and a patrician Republican congresswoman from a tough industrial town in the Northeast”).

311. The federal government’s response to legal changes invalidating discrimination in housing has been at most a discontinuance of discrimination, not any effort to redress past discrimination. See, e.g., *Young v. Pierce*, 628 F. Supp. 1037, 1045-1047 (E.D. Tex. 1985) (reviewing HUD’s actions with respect to public housing); see also Roberta Achtenberg, *Symposium: Shaping American Communities: Segregation, Housing and the Urban Poor: Keynote Address*, 143 U. PENN. L. REV. 1191, 1193-95 (1995) (stating that “the federal government . . . has a long history of having precipitated and perpetrated housing discrimination . . .” which it was “moving to correct”); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 47 HOWARD L.J. (forthcoming 2005).

great power on Capitol Hill.³¹² Satisfying those interests is likely to be essential to the enactment of corrective legislation. This Part suggests some steps designed to encourage the adoption of legislation that would assure effective housing assistance to all veterans, eliminate the disgrace of United States veterans being homeless, and provide compensation for the housing opportunities that were withheld from women veterans and veterans of color.

A. *The Roles of Veterans and Veterans' Organizations*

The history of the veterans' housing programs indicates that veterans and veterans' organizations played a crucial role in securing housing assistance for veterans. After the Civil War, a veterans' organization, the Grand Army of the Republic ("G.A.R."), was a principal and effective advocate for veterans' homes and other benefits.³¹³ After the First World War and the wars that followed, the American Legion and other veterans' organizations were advocates for veterans' benefits. The American Legion generally is given credit for securing the enactment of the G.I. Bill.³¹⁴ We cannot know whether the American Legion might have succeeded in securing housing assistance for all veterans after World War II, but the fact that the Legion proposed a program that benefitted fewer than all veterans made it very likely that no more generous program would be enacted. Indeed, as we have seen, Congress made the housing program of the G.I. Bill significantly less generous than what the American Legion had proposed.³¹⁵

While the power of veterans' organizations may have diminished since World War II, the increase in the number of veterans of the wars in Afghanistan and Iraq

312. See, e.g., The Center for Responsive Politics, *Top Industries Giving to Members of Congress, 2004 Cycle*, at <http://www.opensecrets.org/industries/mems.asp?party=A&cycle=2004> (last visited Jan. 2, 2005) (listing the real estate industry as the third of the industries that contribute most to members of Congress. Commercial banks are listed as eleventh on the list; construction services are thirty-second, home builders are forty-ninth, and building materials industries are forty-eighth); see also The Center for Responsive Politics, *Real Estate: Long-Term Contribution Trends*, at <http://www.opensecrets.org/industries/indus.asp?Ind=F10> (last visited Jan. 2, 2005) (showing real estate contributions from 1990 through 2004, with an average rank for the real estate industry as fourth); *Washington Power* 25, *FORTUNE*, May 28, 2001, at 94 (Fortune Magazine's list of "Washington's most powerful lobbying groups," showing the National Association of Realtors as number nine and the National Association of Home Builders as number eleven); Megan J. Ballard, *Profiting from Poverty: The Competition Between for-Profit and Nonprofit Developers for Low-Income Housing Tax Credit*, 55 *HASTINGS L.J.* 211, 225 (2003).

With respect to the veterans' organizations, see *infra* note 317 and accompanying text.

313. See, e.g., Cetina, *supra* note 7, at 213; SKOCPOL, *supra* note 7, at 56, 141; but cf. Orloff, *supra* note 42, at 46 n.13 (stating that "the initial legislative liberalization of pensions—the Arrears Act of 1879—was not a product of GAR lobbying; rather, the growth of the GAR was stimulated by the Arrears Act").

314. See *supra* notes 79-80, 93 and accompanying text.

315. See *supra* notes 83-93 and accompanying text.

is likely to make those organizations more potent.³¹⁶ The support of veterans' organizations would seem to be a necessary, though not sufficient, condition for the enactment of legislation benefitting all veterans.

When veterans' organizations have been successful, part of the reason has been that they have represented a substantial number of voters³¹⁷ at a time when the two major parties were closely divided, making it particularly important to secure the votes of veterans and their families, and those who sympathized with them.³¹⁸ Numbers alone are not enough to guarantee success, however; veterans' organizations also have failed in efforts to advantage veterans.³¹⁹ Our review of the history of the veterans' housing programs suggests that securing more generous provisions would require that the veterans' organizations play several roles.

First, they should present a prominent and compelling national spokesperson to deliver a powerful national message.³²⁰ Second, they should maintain a strong, professional, effective, national lobbying team.³²¹ Third, the veterans' organizations should use their local affiliates as the basis for a grassroots campaign.³²² The Legion itself did this very effectively in the battle to secure the

316. See, e.g., United Veterans of America, *United Veterans of America*, at <http://www.uvofa.org> (last visited Dec. 29, 2004) (stating that as World War II veterans die, "the ranks of our existing veterans organizations are rapidly thinning out, and with that veterans['] influence in the Halls of Congress diminishes daily"); Editorial, *A Means Test for Veterans*, WASH. POST, Aug. 22, 1985, at A22 ("The veterans groups have influence in Congress.").

317. See Orloff, *supra* note 42, at 46 ("In the Northern and Midwestern states, veterans of the Civil War constituted fully 12 to 15 percent of the electorate, making the 'soldier vote a prize of great worth,' a 'prize' that increased in value with the growth of the Grand Army of the Republic (GAR), the veterans' lobbying group."); see also WECTER, *supra* note 32, at 249.

318. See Orloff, *supra* note 42, at 45 ("[I]n the late nineteenth century . . . In the North and Midwest, Democrats and Republicans faced each other with nearly equivalent popular electoral support." Civil war pensions were a way of securing a few hundred votes "in the most politically competitive states."); *id.* at 41-42 (concluding that welfare programs have not been created simply by popular demand or perception of need, but that "some element of political incentive, flowing from a threat to political control or from an opportunity to gain organizational or electoral advantage, especially in periods of electoral competitiveness or when new voters are entering the polity, must be operating in order to stimulate elite interest and coalition-building in the social welfare field"); see also SKOCPOL, *supra* note 7, at 117, 129.

319. See, e.g., *supra* notes 46-48 and accompanying text; see also SKOCPOL, *supra* note 7, at 111 (warning against "simple reliance on the GAR pressure group thesis").

320. See, e.g., DAVIES, *supra* note 102, at 128 (stating that "[h]ousing reform desperately needed a prominent national figure to revive national interest").

321. See, e.g., *id.* at 130 (discussing the "militant real estate lobby").

322. See, e.g., SKOCPOL, *supra* note 7, at 55 ("In general, U.S. political structures allow unusual leverage to social groups that can, with a degree of discipline and consistency of purpose, associate across many local political districts."); *id.* at 182 (discussing reasons why the American Association for Labor Legislation failed in its efforts to promote more general social welfare measures: "It did not devise emotional appeals that might have made its legislative campaigns

G.I. Bill, and the importance of these activities has been demonstrated in a variety of situations.³²³ Fourth, recognizing that the united support of veterans and their organizations is necessary but not sufficient to induce Congress to create and fund a program that assures effective housing assistance to every veteran, the veterans' organizations should seek support from the "natural" public interest lobby for housing, including labor, "housers," and environmental, civic, religious, health, and progressive business groups.³²⁴ Fifth, intellectual as well as popular support is essential.³²⁵ Sixth, the advocates should have an

attractive to mass-circulation magazines. It did not engage in systematic grassroots political mobilization. Nor . . . did the AALL attempt to use its own organizational resources, or those of allied federated associations, to reach directly into the civic life of local communities—and legislative districts—across the United States Certainly the AALL never developed a fully ramified, federated structure of local, state, and national associations, nor even as extensive a network of formally affiliated local groups as the National Consumers' League"); *see also* Weir et al., *supra* note 144, at 23 ("The American federal state, with its decentralized and nonprogrammatic political parties, has provided enhanced leverage to interests that could associate across many local political districts. Such widespread 'federated' interests—including organizations of farmers such as the Grange and the American Farm Bureau Federation, along with local businessmen linked to the Chamber of Commerce, and certain professional associations including the National Education Association and the American Medical Association—have been ideal coalition partners for nationally focused forces that might want to promote, or obstruct, or rework social policies, especially when proposals have had to make their way through the House of Representatives.").

323. *See* ROSS, *supra* note 24, at 117 (discussing the American Legion's ability, "using their widespread organizational ties," to contact and bring back to Washington a member of Congress who had returned home because of illness); *see also* KEITH, *supra* note 51, at 102 (discussing the ability of the real estate lobby to use local members to launch a national campaign); Weir et al., *supra* note 144, at 23 ("More often, widespread federations—especially those involving commercial farmers and small businessmen prominent in many communities—have obstructed or gutted proposed national social policies."). The veterans' organizations might use the internet to provide a twenty-first century version of the grassroots effort behind the G.I. Bill. *See, e.g.,* Alexis Rice, Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning, Center for the Study of American Government, Johns Hopkins University (Jan. 2004), *available at* <http://www.campaignsonline.org/reports>.

324. *See* Dreier, *supra* note 141, at 371-74 (discussing the need for such alliances); SKOCPOL, *supra* note 7, at 242 (discussing the alliances made by state federations of labor with "farmers' groups, women's associations, middle-class reform groups, party factions, or reformist professionals and civil administrators").

325. *See* SKOCPOL, *supra* note 7, at 57 (discussing the intellectual and popular alliance that helped secure veterans' benefits after the Civil War); *see also id.* at 25 (stating that "[c]ross-class coalitions between professionals and popular groups have been crucial to the enactment of all modern social policies in every nation"); Orloff, *supra* note 42, at 42 (stating that "[t]he support of reformist elites and new middle-class groups as well as the working classes was a necessary condition for the political success of the new programs"); *but see* FUNIGIELLO, *supra* note 62, at 249 (stating that city planners of the 1940s "lacked the special kind of democratic leadership that would enable them to weld philosophic purpose, scientific fact, and popular initiative into a dynamic

effective program for using the arts and the media, both national and local.³²⁶

The development of the veterans' housing programs suggests that the substance of a campaign for corrective veterans' housing legislation should have several themes, the most important of which is that veterans have earned the right to decent housing—that their service in the jungles of Vietnam, the mountains of Afghanistan, and the deserts and cities of Iraq require, at the least, that they and their families be assured decent homes.³²⁷ The Grand Army of the Republic succeeded in its arguments for creation of state homes for veterans and their dependents by making people feel ashamed that “Union soldiers [were] living as paupers in” poorhouses.³²⁸ The nineteenth century view was that veterans were entitled to justice—they were “a selected subset of the working- and middle-class people, citizens of both races, who by their own choices and efforts . . . had *earned aid*—for themselves and their dependents, and even for their communities.”³²⁹

program”).

326. See, e.g., KELLY, *supra* note 5, at 22 (reporting that Frederick Law Olmstead, general secretary of the United States Sanitary Commission, said in 1862 that a policy to aid veterans must “be brought before the public adroitly, cunningly”); see also SKOCPOL, *supra* note 7, at 116-17 (discussing the importance of the press and news sheets “distributed to Union veterans across the country, in order to agitate for arrears legislation”). With regard to the use of the arts in general, see, e.g., ROBERT DARNTON, *THE FORBIDDEN BEST-SELLERS OF PRE-REVOLUTIONARY FRANCE* 191, 246 (1995) (discussing the contribution made by books to the French Revolution); DAVID LEVERING LEWIS, *W.E.B. DUBOIS: BIOGRAPHY OF A RACE, 1868-1919*, at 506-08 (1993) (discussing the effect of the film, *The Birth of a Nation*). Abraham Lincoln is said to have called Harriet Beecher Stowe, author of *UNCLE TOM’S CABIN*, “the little lady who made this big war.” DAVID HERBERT DONALD, *LINCOLN* 542 (1995).

327. “Of the 25 million veterans currently alive, nearly three of every four served during a war or an official period of hostility.” DVA, *About VA: Our Nation’s Veterans*, at http://www1.va.gov/about_va/ (last updated Mar. 3, 2004). The number of veterans in the United States and Puerto Rico varies with different sources—26,549,704, CHRISTY RICHARDSON & JUDITH WALDROP, U.S. CENSUS BUREAU, *VETERANS: 2000, CENSUS 2000 BRIEF 5* (May 2003), available at <http://www.va.gov/vetdata/Census2000/c2kbr-22.pdf>; 25.2 million on September 30, 2003, VA, FY 2005 CONGRESSIONAL BUDGET SUBMISSION, *supra* note 158, at 1-16.

328. Cetina, *supra* note 7, at 219.

329. SKOCPOL, *supra* note 7, at 151 (emphasis in original); see *id.* at 156-57 (expressing similar sentiments). Skocpol states:

U.S. Civil War pensions (and other forms of public help for veterans and dependents) were not conceptualized in socioeconomic terms at all. Instead they were understood in political and moral terms. Legitimate Civil War pensions were idealized as that which was justly due to the righteous core of a generation of men (and survivors of dead men)—a group that ought to be generously and constantly repaid by the nation for their sacrifices. Politicians constantly spoke of a “contract” between the national government and the Union’s defenders in the Civil War, arguing that in return for their valiant service the former soldiers and those tied to them deserved all the public provision necessary to live honorable and decent lives free from want. . . . [T]he Civil War

In the late nineteenth and early twentieth centuries, the veteran was a model. Indeed, the effort to create new benefit programs for workers used veterans as a point of comparison. As Theda Skocpol reports, Charles Richmond Henderson's 1909 book, *Industrial Insurance in the United States*, argued that since "the nation and the states . . . have already declared it to be our duty to shelter the aged and the wounded soldier, why should the victims of the 'army of labor' be neglected?"³³⁰ When a delegate proposed (unsuccessfully) that the American Federation of Labor (AFL) endorse an old-age pension law, the resolution was that "Congress enact an old-age pension law that will do for the aged who have given so much to the industrial struggle what the soldier's pension is designed to do for the old soldier."³³¹ When the AFL decided, in 1909, to support such an effort, the Committee on Resolutions sponsored "an exceedingly adroit draft" of a bill to create an 'Old Age Home Guard of the United States Army,'³³² a proposal supported by "explicit positive analogies to Civil War pensions."³³³ The reason that the votes of veterans and their sympathizers could be earned in this way was that the public in general regarded veterans as deserving of government assistance.³³⁴

Although it is not easy to determine what is society's current view about homelessness in general or homeless veterans in particular,³³⁵ the fact that

pension system, like subsequent provision for "deserving" Americans, was also defined in opposition to charity or public programs for paupers at state and local levels.

Id. at 149; *see also* KELLY, *supra* note 5, at 166 ("[M]ost Americans believed that the federal government had an obligation to shelter citizen-veterans.").

330. SKOCPOL, *supra* note 7, at 156 (quoting CHARLES RICHMOND HENDERSON, *INDUSTRIAL INSURANCE IN THE UNITED STATES* 308-09 (1909)).

331. *Id.* at 213 (quoting PROCEEDINGS OF TWENTY-SECOND ANNUAL AFL CONVENTION 112 (1902)).

332. *Id.* at 215 (quoting REPORT OF THE PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 97-101, 119, 330-31 (1909)).

333. *Id.* at 231.

334. *See id.* at 115 ("Not only did the expansion of Civil War pensions fit the proclivity of the nineteenth-century U.S. polity for distributive policies; the important legal watersheds also reflected the changing competitive strategies of the major political parties; and the forms of new legislation maximized possibilities for using pensions to recruit voters."); *id.* at 117 ("[I]t was very important that northern elected politicians from both parties were highly susceptible at this juncture to arguments on behalf of the Union soldiers and survivors Neither party wanted to appear ungenerous to the widows and disabled soldiers.").

335. Reviewing "many polls, surveys, and experiments," Gary Blasi reported the "quite surprising finding" that "while most people blame poverty on the poor, most people blame homelessness on society." Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 208 (2000). On the other hand, some law review articles and the popular press refer to a "backlash" against the homeless and "compassion fatigue." *See, e.g.,* Vicki Been, *Surveying Law and Borders: Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1114 n.13 (1996) (referring to "compassion fatigue"); Robert C. Ellickson, *Controlling Chronic Misconduct in City*

millions of veterans have suffered homelessness in the 1980s and 1990s and continue to do so into the twenty-first century suggests that the public does not consider that it is shamed when veterans live on the streets. Restoring the earlier sense that a debt is owed to veterans seems essential to securing legislation that will assure decent housing to all veterans.³³⁶

Another useful theme is concern about recruitment. A principal reason for creation of the original soldiers' homes was to encourage recruitment:

Army officers and military officials saw that a military asylum might not

Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 YALE L.J. 1165, 1168 (1996) (referring to "the emphatic backlash of the 1990s"); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 265 (1994); Larry Tye, *Seeking Shelter, The Street People Are Finding Scorn*, BOSTON GLOBE, Aug. 27, 1990, at 1 (referring to a "backlash against the homeless" and "compassion fatigue"). The National Coalition for the Homeless and others have concluded that hostility to homeless people is substantial and increasing. See NATIONAL COALITION FOR THE HOMELESS, ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES 8 (Aug. 2003); Lois M. Takahashi, *A Decade of Understanding Homelessness in the USA: From Characterization to Representation*, 20 PROGRESS IN HUM. GEOGRAPHY 291, 291 (1996); see also Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 732 (1997) (predicting reductions in services for homeless people because of "'compassion fatigue' and taxpayer frustration, and an 'increasingly hostile climate for homeless persons,'" among other factors).

Although it may be tempting to try to explain current antipathy to homeless people by reference to a philosophy of rugged individualism, that explanation would not take account of the strong sense of individualism of the nineteenth century. See SKOCPOL, *supra* note 7, at 16-17 ("When liberal values of individualism, self-sufficiency, voluntarism, distrust of government, and market competition were supposedly at their height in the late nineteenth century, how was it that Americans countenanced such widespread and relatively generous benefits, delivered directly by the federal government, and often to people not suffering from war wounds or economic privation of any kind?"); as to the level of generosity, see *id.* at 128-29 ("By 1893, . . . the federal government was spending an astounding 41.5 percent of its income on benefits for [veterans]."); see also KELLY, *supra* note 5, at 2 ("It is striking that, in an era notorious for its celebration of self-reliant individualism and laissez-faire government, war-disabled Union veterans . . . could look to a federal institution for shelter and medical assistance.").

336. The veterans' advocates also would need to be prepared to respond to attacks. See SKOCPOL, *supra* note 7, at 267-78 (stating that a significant reason why Civil War pensions were abandoned was fear of corruption, although there is no explanation for the fact that this form of corruption was not tolerated, when so many other forms of corruption were); *id.* at 277 ("Visible and highly emotional negative publicity about Civil War pensions during the Progressive period drowned out the scattered voices of labor leaders, certain reformers, and even an occasional businessman, who were prepared to see Civil War pensions as a positive precedent paving the way toward more universal old-age pensions."); *id.* at 278-85 (discussing doubts about the government's ability to administer a program of benefits).

only serve to reward the brave and faithful soldier, but might also make service in the Regular Army appear more attractive to a larger number of individuals and, perhaps, create for the army the image of a kind and humane protector, helping to elevate its position in the eyes of the American people.³³⁷

Providing housing assistance to all veterans is likely to serve as an inducement to recruitment today as it did a century ago.³³⁸

B. The Design of the Program

The history of the development of the veterans' housing programs suggests both general and specific attributes that an improved, corrective veterans' housing program should have.

1. General Attributes of a Corrective Program.—This review suggests that a housing program that successfully serves low-income/low-asset veterans should have three characteristics: it should be an integral part of a program that serves all veterans; it should meet the needs of the lending and real estate industries; and it should satisfy fiscal conservatives by relying on tax or other indirect subsidies rather than direct expenditures.

The debate between proponents of universal programs and proponents of targeted programs is not easily resolved.³³⁹ There is much to be said for universal programs, programs that will serve everyone, veterans and non-veterans. This, as we have seen, is what was sought by some in the FDR and Truman administrations; this is what is evoked by the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the national housing goal established by Congress in 1949.³⁴⁰ Activists and scholars have urged universal housing (and other) programs in the past,³⁴¹ and

337. Cetina, *supra* note 7, at 39; *see id.* at 42 (characterizing an 1829 statement by an Army Adjutant General as an observation that “the army asylum might serve as an incentive to increased enrollment in the ranks of the army”); *id.* at 45 (reporting the belief that “the existence of such an institution would aid in attracting a better class of men into the army’s ranks”); *id.* at 54 (characterizing both the navy and army homes as means to encourage enlistment).

338. A case for effective housing assistance as an essential aid to recruitment might effectively be made by those who argued that recruitment for the officer corps justified race-conscious admissions policies in elite law schools. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

339. *See, e.g.,* Theda Skocpol, *Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411 (Christopher Jencks & Paul E. Peterson eds., 1991); Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in *THE URBAN UNDERCLASS*, *supra*, at 437.

340. *See supra* notes 15-18 and accompanying text.

341. *See, e.g.,* SKOCPOL, *supra* note 7, at 209-10 (discussing Samuel Gompers’s argument against social insurance, for two reasons: “First, it would subordinate [workers] to a state they might not control Secondly . . . Gompers criticized workingmen’s insurance for its departure from universal principles of citizenship. ‘Compulsory social insurance,’ he wrote, ‘is in its essence undemocratic. The first step in establishing social insurance is to divide people into two groups’”).

continue to do so today.³⁴² As a matter of political reality, however, the United States Congress does not seem to be ready to implement a universal right to housing. It might be easier to persuade Congress to implement a right to housing for a smaller, more specific, group: all veterans.³⁴³ A program that serves all veterans would mean a program that provides assistance with rental as well as improved assistance with homeownership, and compensation for the uncorrected inequities of the early decades of the veterans' housing program.³⁴⁴

Not all of these veterans have equal political appeal or power; it might be easier to secure improvement of the homeownership assistance than to provide rental assistance. However, we have seen from the history of the G.I. Bill the danger of dividing veterans into groups. What happened in the 1940s very likely would happen again: if a group of veterans with great political appeal could be satisfied without any provision for veterans who are less powerful politically, those with political appeal would be served, and the others would be neglected. That is why veterans' housing programs today do not serve lower-income/asset veterans, including many veterans with disabilities. Serving those veterans is most likely to be achieved as part of a program that also advantages other veterans, with the veterans and veterans' organizations agreeing not to allow some veterans to be bought off at the expense of all.³⁴⁵ The reasons for presenting an all-veteran program are not only altruistic: part of the appeal of such a program would be that it would eliminate inequities. In the past, Congress has made changes in programs in order to eliminate inequities among veterans.³⁴⁶

Whatever the nature of the corrective program, the history of veterans' housing programs suggests that, while support from veterans' organizations would be necessary, support from the housing and lending industries would be essential. The FHA program, the original VA program, and virtually all other major housing programs in the United States have been created primarily to serve the industries.³⁴⁷ If, but only if, the industries support the development of

342. See, e.g., *id.* at 411; Greenstein, *supra* note 339, at 437.

343. Targeting a program to veterans might, of course, reduce the likelihood of support from advocates for other groups. See *supra* note 324 and accompanying text (discussing the value of coalitions); see also FUNIGIELLO, *supra* note 62, at 248; *id.* at 228-29 (discussing the need for unity, not division, among liberals).

344. See *supra* notes 160-223, 244-83 and accompanying text.

345. See statement of Disabled American Veterans (DAV) National Adjutant Arthur H. Wilson: "Just as we don't leave our wounded behind on the battlefield, we must not leave our homeless veterans behind abandoned on the streets of our cities." *DISABLED AMERICAN VETERANS, The DAV Homeless Veterans Initiative*, at <http://www.dav.org/veterans/documents/homeless1.html> (last visited Jan. 3, 2005). The DAV's official motto is: "We Don't Leave Our Wounded Behind." *Id.*, at http://www.dav.org/veterans/homeless_initiative_print.html (last visited Jan. 3, 2005).

346. See SKOCPOL, *supra* note 7, at 116 ("[M]any Congressmen and officials were perturbed by inequities among veterans New laws often originate in this way, as officials and politicians themselves become dissatisfied with the operation of earlier policies and create revised measures, typically more expensive or interventionist, to correct the situation.").

347. See, e.g., *supra* notes 54-58, 98-101, 113-16, 122-52 and accompanying text; Ballard,

housing programs for veterans, those programs may have a chance of enactment.

Moreover, given the growing deficits in the federal budget,³⁴⁸ a program that relied heavily on direct expenditures would be unlikely to succeed. The major housing programs in the United States—the homeownership deductions and the Low Income Housing Tax Credit program—operate with indirect financing through the tax code.³⁴⁹ That is the most likely way to provide significant additional housing assistance to veterans or anyone else.

2. *Specific Attributes of a Corrective Program.*—A corrective program that served all veterans would provide (a) rental assistance, (b) improved homeownership assistance, and (c) redress for the early, uncompensated exclusions of women and non-white veterans.

a. *A subsidized rental program for veterans.*—It is clear, and the “VA acknowledges that it alone cannot meet all their [homeless veterans’] needs. These programs are not available in all locations and, where available, capacity for residential treatment is limited.”³⁵⁰ HUD-VASH provides fewer than 1800 vouchers, and HCHV and DCHV provide small numbers of accommodations. These accommodations, moreover, are not permanent. When veterans are discharged from HCHV and DCHV, many of them are discharged without housing.³⁵¹

While some—though by no means all—of these homeless veterans need physical or mental health or substance abuse services, employment counseling or retraining, or assistance with insurance and benefit programs, what they all need is a place to live: housing.³⁵² Mental illness and substance abuse do not

supra note 312, at 221, 225.

348. See, e.g., CONGRESSIONAL BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2004-2013*, at xvii (Jan. 2003).

349. See Steven C. Bourassa & William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing*, 11 HOUSING POL’Y 521, 521-25 (2000); see also Jean L. Cummings & Denise Dipasquale, *The Low-Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 HOUSING POLICY DEBATE 251, 252, 278 (1999); Ballard, *supra* note 312, at 223 (“supporters of the LIHTC program maintain that it is a more politically palatable alternative to traditional subsidized housing because the tax credits result in federal revenues foregone rather than a direct expenditure of limited federal dollars”).

350. GAO REPORT, *supra* note 11, at 11.

351. See GAO BASCETTA, *supra* note 230, at 7 (“In fiscal year 1997, about 8,500 veterans were discharged from” DCHV and HCMI. Only “57 percent of DCHV veterans were housed at discharge,” and “39 percent of HCMI veterans reported having their own apartment, room, or house at discharge.”). In 1991, the National Coalition for the Homeless had recommended that the VA “immediately implement national discharge planning procedures.” HEROES TODAY, HOMELESS TOMORROW?, *supra* note 11, at iv. This recommendation has not been implemented. See Interagency Council on Homelessness, Innovative Initiative, *Category: Homelessness Prevention/Discharge Planning*, at <http://www.ich.gov/innovations/1/> (last updated Apr. 25, 2003) (discussing discharge planning).

352. See Robert Rosenheck et al., *Special Populations of Homeless Americans*, in HUD & HHS, PRACTICAL LESSONS: THE 1998 NATIONAL SYMPOSIUM OF HOMELESSNESS RESEARCH 2-1, 2-3

cause homelessness: most people who are substance abusers, or mentally ill, or both, are perfectly well housed. What causes homelessness, among veterans and other people, is poverty.³⁵³ As a recent HUD/HHS investigation concluded: "Every study that has looked has found that affordable, usually subsidized housing, prevents homelessness more effectively than anything else. This is true for all groups of poor people, including those with persistent and severe mental illness and/or substance abuse."³⁵⁴ "For the most part, veterans become homeless for the same reasons that all Americans become homeless—they can't afford to pay the rent."³⁵⁵

It would be useful to further study the housing needs of veterans, to gain a more detailed sense of the numbers of veteran households that need housing assistance, the income levels, family sizes, disability status, and geographic distribution of those households, and the extent to which homeownership or rental assistance would meet those needs. Even without such a study, however, the fact that more than half a million veterans experience homelessness each year signals that it is probable that veterans need more than half a million subsidized rental units.

Pending further study of veterans' housing needs, it is not possible to know to what extent the veterans' housing needs may be met by subsidizing payments (as with housing vouchers) and to what extent new production of units is required. (New production is most likely to be required for households that need three bedroom or larger units, households that require particular accommodation for physical disabilities, and households in geographic areas with relatively little available housing.) Until further study of veterans' housing needs has been completed, it is reasonable to assume that both forms of housing subsidy would be required.

Existing programs provide useful models for addressing veterans' housing

to 2-4 (Linda B. Fosburg & Deborah L. Dennis eds., Aug. 1999) [hereinafter PRACTICAL LESSONS].

A study of housing vouchers and intensive case management for homeless people with chronic mental illness found that vouchers, but not intensive case management, improved housing outcomes An evaluation of a nine-city services-enriched housing program for homeless families with multiple problems . . . found that the vast majority of these families were still in Section 8 housing at an 18-month follow-up. The authors concluded "that it may be an investment in helping families to regain their stability and ultimately perhaps, their footing in the workforce."

Id.

353. See BURT ET AL., *supra* note 11, at 8 ("Housing affordability was, and still is, assumed to be the immediate cause of homelessness.").

354. Marybeth Shinn & Jim Baumohl, *Rethinking the Prevention of Homelessness*, in PRACTICAL LESSONS, *supra* note 352, at 13-1; see also Linda B. Fosburg & Deborah L. Dennis, *Overview*, in PRACTICAL LESSONS, *supra* note 352, at v, vi-vii ("We know that subsidized housing works. . . . Receipt of affordable housing is the single greatest predictor of formerly homeless persons' ability to remain in housing."); BURT ET AL., *supra* note 11, at 14 ("the answer [to homelessness], succinctly put, is 'housing'") (citation omitted).

355. HEROES TODAY, HOMELESS TOMORROW?, *supra* note 11, at 10.

needs. For those veterans who need only financial assistance, an appropriate model is the Section 8 voucher program.³⁵⁶ For those who need financial assistance and supportive services, an appropriate model is the HUD-VASH program.³⁵⁷ And for those who need new production, an appropriate model is the largest subsidized housing production program in the United States today, the Low Income Housing Tax Credit program.³⁵⁸

It is clear that these programs do not now produce enough housing to meet the needs of veterans. There are many more people eligible for and in need of Section 8 vouchers and supportive housing and subsidized rental units than these programs can accommodate; the existence of long waiting lists evidences only some of this unmet need.³⁵⁹ If these programs were capable of meeting the existing need, there would not be millions of people, including at least half a million veterans, experiencing homelessness each year.³⁶⁰

The inadequacy of the resources of the existing programs shows why the veterans' needs cannot be met out of those existing resources. Nonetheless, some might be tempted to propose to meet the veterans' needs by creating "setasides," designating some vouchers and supportive housing and subsidized units for veterans, allowing the veterans to claim those benefits in preference to non-veteran households. This is, indeed, what has been done with the HUD-VASH program, designating some Section 8 vouchers as a "setaside" for veterans. But such a "setaside" program meets veterans' compelling needs only by denying relief to the compelling needs of others—the elderly, disabled, and other lower-income people already served by these programs. Such setasides also violate the

356. 42 U.S.C. § 1437f (o) (2000).

357. See *supra* notes 236-38 and accompanying text.

358. See ABT ASSOCIATES, INC., HUD UPDATING THE LOW-INCOME HOUSING TAX CREDIT DATABASE: PROJECTS PLACED IN SERVICE THROUGH 1999, at 2 (Apr. 2002), available at <http://www.huduser.org/datasets/lihtc/report9599.pdf>.

359. See National Low Income Housing Coalition, *Housing Choice Vouchers (Tenant-Based Rental Assistance)*, at <http://www.nlihc.org/advocates/housingchoicevouchers.htm> (last visited Dec. 28, 2004); see also HUD, *HUD's Public Housing Program*, at <http://www.hud.gov/renting/phprog.cfm> (last updated Dec. 5, 2000) (stating that "[s]ince the demand for housing assistance often exceeds the limited resources available to HUD and the local [housing agencies], long waiting periods are common"). As this Article goes to press, the Administration has proposed funding restrictions that will reduce significantly the number of vouchers available. See Center on Budget and Policy Priorities, *Special Series: Housing Voucher Program*, at <http://www.cbpp.org/housingvoucher.htm> (last updated Oct. 12, 2004).

360. In addition, existing subsidized units are being lost as restrictions on project-based Section 8, LIHTC, and Rural Development units are expiring. See, e.g., NATIONAL HOUSING TRUST, CHANGES TO PROJECT-BASED MULTIFAMILY UNITS IN HUD'S INVENTORY BETWEEN 1995 AND 2003: NUMBER OF AFFORDABLE PROJECT-BASED UNITS DECLINES BY 300,000, at 1-15 (2004), available at http://www.nhtinc.org/documents/PB_Inventory.pdf; WASHINGTON STATE HOUSING FINANCE COMMISSION, A REPORT ON MULTI-FAMILY HOUSING AND PRESERVATION ACTIVITIES 1-2 (2001), available at <http://www.WSHFC.org/preservation/preservation-report.htm>; see also Ballard, *supra* note 312, at 235.

principle of veterans' exclusiveness and administration by the DVA, principles that have been important to veterans for decades.

What will best serve veterans is not an illusory "setaside" of inadequate resources administered by HUD, the Treasury Department, and the state housing finance authorities. Rather, what will best serve veterans is an entitlement program, administered by the DVA, which guarantees every veteran an opportunity to rent or buy housing appropriate for her or his household.

The principal model for such a program would be the Section 8 voucher program, with some modifications: the resident contribution should be limited to 20% (rather than 30%) of household income,³⁶¹ there should be no 120-day limitation on the use of the vouchers,³⁶² and there should be a federal prohibition against discrimination on the basis of having such a veterans' voucher. There is, after all, no reason why a landlord should be permitted to refuse to accept as a tenant a person who has served the country, or the survivor of one who died in the service.

For supportive housing, the HUD-VASH program should be expanded, with an appropriation for additional vouchers specifically for veterans and additional VA supportive housing funding to accommodate the vouchers. For production of new units (and rehabilitation of existing units), the LIHTC program is a good model because it has proven itself to be effective in producing units and has considerable political support. Detailing the mechanics of adapting the LIHTC program to serve veterans is beyond the scope of this Article, but increasing tax credit allocations in proportion to each state's population of veterans would seem to be the basis for such an accommodation. LIHTC sponsors should be required to report on the number of veterans they serve. Just as DVA and HUD collaborate on the HUD-VASH program, DVA and Treasury could collaborate in expanding the LIHTC program so that it serves veterans. The principal defect of the LIHTC program is that its subsidy alone is inadequate to serve the lowest-income households, but the availability of vouchers would help to address that problem.³⁶³

361. From 1969 to 1981, public housing rents were limited, in general to 25 percent of household income; Congress changed this in 1981 to reduce HUD's expenses. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357; MICHAEL STONE, SHELTER POVERTY 34 (1993) ("For a time, analysts and policymakers thought 20 percent was appropriate."). Michael Stone argues that "no universal percentage of income [standard] makes sense." *Id.* at 34. He demonstrates that 25% of income is far too high for many households. *Id.* at 34-50.

362. See MARGERY AUSTIN TURNER & KALE WILLIAMS, HOUSING MOBILITY: REALIZING THE PROMISE, REPORT FROM THE SECOND NATIONAL CONFERENCE ON ASSISTED HOUSING MOBILITY 10 (1998).

363. See Kathryn P. Nelson, *Whose Shortage of Affordable Housing?*, 5 HOUSING POL'Y DEBATE 401, 411 (1994) ("Unless they have additional subsidies, LIHTC occupants must have incomes between 40 and 60% of the median to avoid severe rent burdens, and research shows that families who occupy such units do have incomes in that range.") (footnote omitted); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011, 1016 (1998); Ballard, *supra* note 312, at 231.

b. Improving the DVA Homeownership Program.—Although today “[a]lmost anyone who has served on active duty” is entitled to a home mortgage guarantee,³⁶⁴ only about one per cent of veterans use the program.³⁶⁵ Of those who do not use the program now, some do not need any housing help at all, and some need a subsidized rental program. Some, however, might well make use of an improved homeownership program.

It would be useful for DVA to study the reasons why ninety-nine per cent of veterans do not use the guaranteed home loan program. What we do know is that the current program’s principal advantage is that it “reduces or eliminates the down payment”; it is “most advantageous to first-time homebuyers.”³⁶⁶ There are several steps that could be taken to make homeownership available to more veterans.

First, the VA should offer a deeper subsidy for homeownership. The VA vouchers could be used for homeownership, as HUD vouchers are now;³⁶⁷ for production of homeownership units for lower income/asset households, the Department of Agriculture’s Rural Housing Service offers a model.³⁶⁸ A foreclosure avoidance program should be established for veterans’ housing; Congress should enact a program like the HUD Mortgage Assistance Program, converting the VA refunding authorization into a mandatory program.³⁶⁹ To discourage more general restrictive judicial interpretations of the assistance available to veterans, Congress should specify that assistance to veterans is the primary objective of the programs.³⁷⁰

c. Redressing the past discrimination against female and minority veterans.—The women and veterans of color who were excluded from the benefits of the guaranteed home mortgage program after World War II suffered a significant financial, social, and psychological detriment. They are identifiable people who were the victims of government discrimination on the basis of gender and race. In the expanding discourse about reparations theory and practice, these veterans of United States military service also deserve a place that assures that they will be compensated for what they lost in the early years of the VA housing program.³⁷¹

364. Capt. Gerald A. Williams, *A Primer on Veterans’ Benefits for Legal Assistance Attorneys*, 47 A.F.L. REV. 163, 178 (1999).

365. See THE ENCYCLOPEDIA OF HOUSING, *supra* note 9, at 116; see *supra* note 9 and accompanying text.

366. *Id.*

367. 24 C.F.R. § 982.625 (2004).

368. See *supra* note 279.

369. See *supra* notes 209-23 and accompanying text.

370. See National Housing Law Project Memorandum from Roberta Youmans and Gideon Anders, to Senator John Rockefeller and Ms. Barbara Pryor (Feb. 4, 1992) (discussing these points and recommending corrective statutory language) (on file with author); see also HEROES TODAY, HOMELESS TOMORROW?, *supra* note 11 at iv, 21, 31.

371. See ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 389-443 (2001); Florence Wagman Roisman, Redressing Racial

CONCLUSION

The United States government's current housing programs for veterans fail to meet the needs of most veterans, the deficiency being starkest with respect to the more than half million veterans who suffer literal homelessness each year. Despite all the current rhetoric of "supporting our troops" and aiding veterans and their dependents and survivors, most veterans today, including most veterans with service-connected and other disabilities, receive no housing assistance whatsoever from the federal government. This is hardly a model of gratitude for the wealthiest, most powerful nation on earth; it can and should be corrected.

Discrimination and Segregation in the FHA and VA Homeownership Programs (Nov. 16, 2001) (paper presented at the conference on Housing Opportunity, Civil Rights, and the Regional Agenda, November 16, 2001, sponsored by the Civil Rights Project of Harvard University, the Harvard Joint Center for Housing Studies, and The Brookings Institution Center on Urban and Metropolitan Policy).

THE DESCENDANTS OF *FASSIHI*: A COMPARATIVE ANALYSIS OF RECENT CASES ADDRESSING THE FIDUCIARY CLAIMS OF DISGRUNTLED STAKEHOLDERS AGAINST ATTORNEYS REPRESENTING CLOSELY-HELD ENTITIES

MATTHEW J. ROSSMAN*

INTRODUCTION

It has been over twenty years since the Michigan Court of Appeals considered and decided *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*¹ This case involved a suit by one fifty percent shareholder (Fassihi) of a closely held corporation against the corporation's attorney after Fassihi was forced out of the business by the other fifty percent shareholder, allegedly with the attorney's help. *Fassihi* has since come to stand for the general proposition that an attorney who represents a closely-held business entity may owe a fiduciary duty, akin to that owed to a client, to each of the entity's individual stakeholders² even when she does not represent them individually.³ This duty is especially likely to exist when the entity has a small number of stakeholders and is particularly likely to be implicated when the entity, or those who control it, asks for the assistance or advice of the attorney in taking action adverse to a stakeholder. Although by no means the only case of its time to address an attorney's duties to constituents of a "closely-held" client,⁴ *Fassihi* is the

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1. 309 N.W.2d 645 (Mich. Ct. App. 1981).

2. "Stakeholder," for purposes of this Article, essentially means "constituent," as that term is defined in the Comment to Rule 1.13 of the American Bar Association's Model Rules of Professional Conduct ("MRPC"), but of a "closely held entity," rather than a large publicly traded corporation. "Constituent" is defined in the Comment to mean "[o]fficers, directors, employees and shareholders . . . of the corporate organizational client" and "the positions equivalent to [those] held by persons acting for organizational clients that are not corporations" and applies to all organizations, no matter the size or complexity. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2003). Because the cases discussed in this Article specifically address closely held entities, it is important to distinguish the use of the term "constituents" in this context. The term "stakeholder," with its connotation of equity ownership, is appropriate considering that in most closely held entities most or all of the constituents are equity owners.

3. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. h (2000).

4. The terms "close," "closed," and "closely-held" are often used interchangeably as adjectives before "corporation" to mean corporations with a relatively limited number of shareholders, the shares of which are not publicly traded. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS: LAW AND PRACTICE § 1.02 (rev. 3d ed. 2002 (1971)). Certain states further refine this general concept by providing that close corporations are those in which there is "substantial majority stockholder participation in the management, direction and

preeminent case recognizing a stakeholder's claim of breach of fiduciary duty against an attorney who represents only the business.

Twenty years after *Fassihi*, its central proposition has certainly not gained universal acceptance in the nation's courts. Some jurisdictions have flat out rejected it, while others have confused or combined the question of whether a fiduciary relationship exists between an attorney and individual stakeholder with the question of whether they have established a separate attorney-client relationship.⁵ Furthermore, disgruntled stakeholders routinely assert other theories of fiduciary-type liability, which have also received uneven treatment in the courts, against business attorneys in circumstances factually similar to *Fassihi*.

The resulting lack of certainty is disconcerting for attorneys who represent closely-held entities. What is disconcerting is not that courts are developing or expanding theories of liability to hold accountable attorneys who clearly behave improperly, but rather that it is difficult to gauge where courts stand on these theories. Perhaps even more perplexing, the theories are not always consistent in their application with guidelines governing attorney behavior—in particular, the guidelines established by the American Bar Association's ("ABA") Model Rules of Professional Conduct ("MRPC").⁶

This state of affairs could adversely impact both lawyers for closely-held businesses and the clients they serve. Uncertainty regarding to whom within a business a lawyer owes duties could cause risk averse lawyers to avoid serving closely-held businesses, impose "self-protective reservations"⁷ in the attorney-client relationship, or overcompensate by considering the interests of an entity and each of its individual constituents whenever a significant decision needs to be made, even when this would not otherwise be appropriate. Less cautious attorneys could be subject to overbroad liability and the risk of lawsuits

operations of the corporation" and/or where restrictions are placed on the transfer of its shares. *Id.* (citing *Donahue v. Rodd Electrotpe Co. of New England, Inc.*, 328 N.E.2d 505, 511 (Mass. 1975)); see also BROOKE WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS 231 (1987) (citing *Donahue*, 328 N.E.2d at 511).

Considering that almost all jurisdictions and the MRPC use the same or similar analysis for most business entities, e.g., corporation, partnership, LLC, etc., when determining an attorney's representational obligations, the author of this Article will use the more universal terms "closely-held business" or "closely-held entity" rather than "closely-held corporation." See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003); see also *id.* at R. 1.13 cmt. 1; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361, at 2 (1991) ("There is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents.")

5. See *infra* Part I.B.

6. See generally MODEL RULES OF PROF'L CONDUCT (2003).

7. This phrase appears in *Goodman v. Kennedy*, 556 P.2d 737, 743 (Cal. 1976), to describe one consequence associated with overbroad liability in this context. The contention is that the lawyer will modify and/or withhold advice to an entity client to avoid any negative impact on the interests of individual stakeholders and thus minimize the threat of claims by disgruntled stakeholders.

whenever a stakeholder feels he or she has gotten the short end of the stick in a dispute relating to the business. In fact, the author's interest in this subject grew out of his own experiences representing small businesses and repeatedly encountering the ethical and professional dilemmas caused when formerly rosy relationships among business partners began to wither.

In recent years, several courts have addressed claims resulting from what might be referred to as the "Fassihi Scenario," i.e., when a stakeholder in a closely-held business contends that the actions of one or more other stakeholders or the entity have adversely affected him or her and that the attorney is partially to blame for her participation in, or even mere facilitation of, whatever took place. These cases are worth examining closely for several reasons. First, they underscore how jurisdictions continue to differ on whether and to what degree attorneys must heed the interests of individual stakeholders while counseling a business on a decision or course of action that directly affects stakeholders' interests. At the same time, the cases do indicate some uniform trends in the courts on the viability of particular fiduciary-based theories of attorney liability frequently asserted by disgruntled stakeholders and provide a good sense of where the law is headed. Finally, considering these cases in combination with *Fassihi*, other related caselaw, and the MRPC, provides valuable lessons for how attorneys can frame and conduct their representation of closely-held entities to reduce their potential for liability if these inherently thorny situations arise.

Accordingly, this Article will examine three of these recent cases closely and then make observations about what these "descendants of *Fassihi*" say about the state of the law and how they should impact attorney behavior. To provide proper context for this discussion, a short summary of *Fassihi* and other contemporary responses to the issues raised in *Fassihi* follows.

I. *FASSIHI* AND OTHER RESPONSES

A. *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Taylor, P.C.*

The facts of *Fassihi* are fairly straightforward. Fassihi, a radiologist, was one of two fifty percent shareholders of a closely-held professional corporation.⁸ The corporation formed after Lopez, another radiologist, asked Fassihi to join him in a medical practice at the hospital with which Lopez was affiliated. After practicing together for a short time, Lopez decided to cut ties with Fassihi and asked the corporation's lawyer to determine how Fassihi could be ousted. The lawyer complied and a meeting of the Board of Directors of the corporation was purportedly held (without Fassihi present) at which the Board voted to terminate Fassihi's interest.⁹ The *Fassihi* court noted some skepticism as to whether the Board could have taken this action, both because Lopez and Fassihi disagreed as to whether or not the Board had a third director in addition to them, and because

8. *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 309 N.W.2d 645, 647 (Mich. Ct. App. 1981).

9. *Id.*

it seemed unusual to the court that a board could simply terminate a stockholder's interest.¹⁰ At the very least, however, the action resulted in hospital officials notifying Fassihi that he was no longer eligible to practice at the hospital.¹¹ Unbeknownst to Fassihi, but known to Lopez and the corporation's lawyer, membership in the corporation was required for retention of medical staff privileges at the hospital.¹²

Fassihi subsequently sued the corporation's lawyer alleging legal malpractice, breach of "fiduciary, legal and ethical" duties, and fraud stemming from the lawyer's participation in Fassihi's ouster.¹³ On appeal from the trial court's denial of Fassihi's motion for summary judgment, the Michigan Court of Appeals addressed the question of whether Fassihi had standing to bring any individual claims against the law firm, which claimed to represent only the corporation. The fraud issue aside, the court noted that the case presented it with a difficult question, "what duties, if any, an attorney representing a closely held corporation has to a 50% owner of the entity, individually . . . a problem of first impression in Michigan."¹⁴

Although it agreed with the defendant that an attorney for a corporation represents the corporation and not its shareholders, the court held that the absence of an attorney-client relationship between a corporation's lawyer and one of its stakeholders does not preclude the existence of a fiduciary relationship between them.¹⁵ Instead, a fiduciary relationship arises whenever

[O]ne reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable and the origin of the confidence is immaterial. . . . [W]hether there exists a confidential relationship . . . is a question of fact.¹⁶

Not only might a fiduciary relationship be found, the court noted that such relationships between lawyers and stakeholders are likely to occur in closely held corporations "where the number of shareholders is small."¹⁷ In these instances, "corporate attorneys, because of their close interaction with a shareholder or shareholders, simply stand in confidential relationships in respect to both the corporation and individual shareholders."¹⁸ Fassihi's simple assertion that he "*believed that, as a 50% shareholder . . . , defendant would treat him with the same degree of loyalty and impartiality extended to the other shareholder,*"¹⁹

10. *Id.* at 647 n.2.

11. *Id.* at 647.

12. *Id.*

13. *Id.* at 646.

14. *Id.* at 647-48.

15. *Id.* at 648.

16. *Id.* (internal citations omitted).

17. *Id.* at 649.

18. *Id.*

19. *Id.* at 648 (emphasis added).

along with the other facts, was sufficient to “tend[] to show some legal duty on the part of the attorney to him personally.”²⁰

Moreover, *Fassihi*’s allegations regarding the lawyer’s behavior—in particular, his active and covert participation in a plan with one shareholder to deprive *Fassihi* of the economic benefit associated with his fifty percent interest in the corporation—seemed to the court to be the type of behavior that would constitute a breach of duty if a fiduciary relationship existed. Accordingly, the court of appeals found that it could not dismiss this claim simply as a matter of law and remanded the case to the trial court.²¹

Fassihi is significant for at least two reasons. First, its approach was distinguishable from a contemporary line of cases in which the central issue in upholding the claims of the stakeholders of a closely-held corporation against the entity’s attorney was whether the attorney represented the stakeholders as individuals.²² Both *Fassihi* and its contemporaries acknowledged the same reality, namely, that “treating a closely held corporation with few shareholders as an entity distinct from the shareholders”²³ potentially disregards a stakeholder’s sometimes reasonable perception that the lawyer for the business is representing his or her interests. But rather than tying up this issue solely in the question of who the attorney represents, *Fassihi* recognized the possibility of a separate fiduciary duty owed to a non-client stakeholder and therefore potentially created an obligation on the attorney’s part in many more representations.

Fassihi is also significant for the standard it used to determine whether a fiduciary duty actually existed. Lawyers are considered to owe clients two primary duties—a duty of care (essentially a duty of competent representation) and a fiduciary duty (composed of various obligations of confidentiality and loyalty).²⁴ A separate line of cases had already established the circumstances under which non-client stakeholders could assert a breach of the duty of care against an attorney—by meeting the very narrowly applied “intended beneficiary” test.²⁵ Rather than apply this standard, the *Fassihi* court posited that a fiduciary relationship existed in this context whenever someone “repose[d] faith, confidence and trust in another’s judgment and advice.”²⁶ Although the court did not go into extensive detail about how this standard might be met, it did connect the standard to the stakeholder’s belief of what the relationship entailed and, simply as stated, the “reposed faith, confidence and trust” standard would almost certainly be easier for a stakeholder to meet than the “intended beneficiary” test. Furthermore, it suggested that this type of relationship is

20. *Id.* at 649 n.6.

21. *Id.* at 648-50.

22. *See, e.g., In re Conduct of Kinsey*, 660 P.2d 660 (Or. 1983); *In re Banks*, 584 P.2d 284 (Or. 1978).

23. *Fassihi*, 309 N.W.2d at 649.

24. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48,49 (2000).

25. *See infra* notes 85-88 and accompanying text for discussion of this test.

26. *Fassihi*, 309 N.W.2d at 648.

typical in a lawyer's representation of a closely-held entity. Again, the practical effect of *Fassihi* appeared to be the broadening of circumstances under which a non-client, disgruntled stakeholder could successfully assert a claim against the entity's attorney.

B. Other Responses to the Fassihi Scenario

Since *Fassihi*, several courts have recognized the potential for a fiduciary relationship between the attorney for a closely-held entity and its individual stakeholders in the absence of an attorney-client relationship.²⁷ This is true not only in cases addressing the *Fassihi* Scenario, but also in attorney disqualification cases where a stakeholder of a business entity has successfully objected to an adverse party's use of the entity's attorney in litigation involving the stakeholder.²⁸ It is fair to say that it is now commonplace for a stakeholder involved in either type of proceeding to attempt to claim the existence of a fiduciary relationship with the entity's attorney. Moreover, the circumstances under which courts have acknowledged that this fiduciary relationship potentially applies have gone beyond the inherently adverse stakeholder squeeze-out to include the execution of more routine corporate tasks.²⁹

At the same time, *Fassihi*'s central proposition has certainly not been universally accepted. One example is *Egan v. McNamara*,³⁰ decided shortly after *Fassihi*. In *Egan*, the D.C. Court of Appeals considered a claim of the estate of a majority shareholder of a close corporation against the corporation's attorney alleging that the attorney breached a fiduciary duty by not warning the shareholder about certain aspects of a shareholder's agreement that adversely affected his interests.³¹ The court replied resoundingly that the attorney only had obligations to the corporation, despite the fact that the attorney had previously represented the majority shareholder on personal matters: "[T]here was no fiduciary duty. [The lawyer] represented the corporation, an entity legally distinct from its directors, and officers, and shareholders. As [the corporation's]

27. See, e.g., *Johnson v. Superior Court*, 45 Cal. Rptr. 2d 312 (App. Ct. 1995) (holding that lawyer for limited partnership had fiduciary obligations to each of the partners whether or not he represented them individually); *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. Dist. Ct. App. 1994) (considering claim of fiduciary duty by shareholder of closely-held corporation against corporation's attorney); *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings, & Berg, P.C.*, 541 N.E.2d 997 (Mass. 1989) (noting, in dicta, that there is logic in proposition that lawyer for closely-held corporation owes nonclient shareholders fiduciary duty); *Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 128 (N.Y. App. Div. 2001) (reinstating claim of breach of fiduciary duty by minority shareholder against corporation's attorney); *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335 (Ohio 1994) (finding lawyer for limited partnership owed duties to limited partners).

28. E.g., *Marguiles v. Upchurch*, 696 P.2d 1195 (Utah 1985) (holding that law firm's representation of limited partnership gave rise to fiduciary duty with respect to individual partners).

29. See, e.g., *Brennan*, 640 So. 2d at 143 (negotiation of shareholders' agreement).

30. 467 A.2d 733 (D.C. 1983).

31. *Id.* at 738.

counsel, his obligation was to ensure that the agreement was in the best interest of the company, regardless of its impact on individual shareholders.”³² Several other courts have found likewise, citing the inevitability of conflicts arising between the interests of an entity and those of its stakeholders, the impracticality of an attorney having to consider the interests of a potentially unlimited number of parties with every entity decision, and the inconsistency of such a duty with applicable rules of professional conduct.³³

Other courts have appeared willing to consider the claim, but reluctant to find in favor of the stakeholder notwithstanding compelling facts. A prime example is *Skarbrevik v. Cohen, England & Whitfield*.³⁴ In this case, a California appeals court overturned a trial court’s decision in favor of a twenty-five percent shareholder (Skarbrevik) of a closely-held corporation who was forced out of the corporation by the other three shareholders and the corporation’s attorney. The court of appeals found that the facts did not support the existence of a fiduciary duty owed by the attorney to Skarbrevik, even though the attorney’s actions were at least as detrimental to the ousted shareholder as in *Fassihi*.³⁵ The attorney assisted the other shareholders in reneging on a previous offer to buy out Skarbrevik and then facilitated the amendment of the corporation’s Articles of Incorporation to eliminate Skarbrevik’s preemptive right to proportional participation in stock issuances so that the others could ultimately dilute his interest. In finding that the corporation’s attorney owed duties only to the corporation and not to individual shareholders, the court specifically distinguished the facts at hand from *Fassihi* stating, “the evidence at trial established no such relationship of trust and confidence between plaintiff and defendant attorneys which would give rise to a fiduciary duty.”³⁶

Generally speaking, rules governing attorney behavior do not directly address the *Fassihi* Scenario and, in fact, could very well be construed as inconsistent with *Fassihi*. Rule 1.13(a) of the MRPC, which has been adopted in most U.S. jurisdictions, states that an attorney retained by an organizational client “represents the organization acting through its duly authorized constituents.”³⁷ Section (e) of Rule 1.13 states that the “lawyer may also represent any of [the

32. *Id.* at 739.

33. *See, e.g.,* *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683 (Mo. Ct. App. 1994) (citing similar litany of reasons for not recognizing fiduciary relationship in this context).

34. 282 Cal. Rptr. 627 (Ct. App.1991).

35. *Id.* at 639.

36. *Id.* at 636.

37. MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2003); *see also* MODEL CODE OF PROF’L RESPONSIBILITY EC 5-18 (1981), which provides that:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder . . . or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

organization's] directors, officers, employees, members, shareholders or other constituents" subject to the Rules governing conflicts of interest, but in no way implies that the lawyer automatically does represent any of these constituents nor specifies any circumstances under which the lawyer might be deemed to owe duties to any individual constituents.³⁸ In fact, section (d) of Rule 1.13 explicitly directs the lawyer to clarify to constituents that he or she represents only the organization when it is apparent that the "organization's interests are adverse to those of the constituents with whom the lawyer is dealing."³⁹ Read literally, Rule 1.13 seems to say that the lawyer for a closely-held entity must follow the direction of those constituents authorized to make decisions for the entity, without concern for whether a particular decision adversely affects the interests of one or more stakeholders.

In a 1991 formal opinion, the ABA's Standing Committee on Ethics and Professional Guidance, which is charged with interpreting the MRPC, provided some additional guidance on these particular aspects of Rule 1.13.⁴⁰ Among other things, Formal Opinion 91-361 clarified that "[a]n attorney-client relationship does not automatically come into existence between a partnership lawyer and one or more of its partners," or, by extension, the lawyer and individual stakeholders of any type of entity.⁴¹ It also provided, however, that such a relationship could arise in ways other than just an express agreement between the lawyer and stakeholder, including where there is evidence of reliance by the individual stakeholder on the lawyer or of the stakeholder's expectation of personal representation. Interestingly, the Opinion itself made no mention of any duties owed by a lawyer to those constituents the lawyer does not separately represent, however, *Fassihi* is cited in a footnote for the proposition that "[i]n small partnerships, as with closely held corporations, . . . the likelihood that the attorney representing the entity will be held to stand in a confidential, or fiduciary, relationship with the individual shareholders, or partners, is much greater."⁴² It must be stressed, however, that the Opinion did not specifically discuss or endorse the position of the *Fassihi* court, nor did it take a position on exactly when an attorney representing such an entity owes fiduciary duties to its stakeholders. In summary, the position of the ABA appears to be that a lawyer facing a *Fassihi* Scenario must act in accordance with the wishes of an entity's duly authorized constituents and owes no duties of any kind to individual stakeholders unless he or she has expressly or impliedly agreed to represent them.

38. MODEL RULES OF PROF'L CONDUCT R. 1.13(e).

39. *Id.* R. 1.13(d).

40. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

41. *Id.*

42. *Id.* at n.5.

II. THE RECENT CASES

A. Cacciola v. Nellhaus⁴³

1. *Facts.*—This recent Massachusetts case involved a family business—four brothers who owned equal twenty-five percent interests in a real estate partnership.⁴⁴ Although two of the brothers—Edward and Anthony—handled the day-to-day operations of the business, a written partnership agreement gave all four equal authority in its management and in partnership decisionmaking. After Anthony's death, his estate became successor in interest to his partnership share. Pursuant to the partnership agreement, the partnership had the option to purchase the share.⁴⁵ Although some discussions took place among the remaining brothers about purchasing the share (including one between Edward and his brother Salvatore in which they agreed the partnership should buy it), the partnership did not proceed further with the matter.

A year and a half had passed when Salvatore, to his surprise, “received a financial statement from the partnership’s accountant showing Edward with a fifty percent interest in the partnership.”⁴⁶ Edward had purchased Anthony’s interest from his estate, allegedly at below market value and without notifying the other partners. To convince the estate to sell to him, Edward allegedly told its representatives that Salvatore (and presumably his other brother, David) was not interested in the share. Edward closed the transaction with the assistance of the partnership’s longtime lawyer, Howard Nellhaus. Not only did Nellhaus serve as lawyer for the transaction, but he advised Edward that Edward had the right and authority to purchase the share without notice to Salvatore, despite the fact that the partnership had the first option to buy Anthony’s share.⁴⁷ When Salvatore asked Nellhaus for information about the transaction, Nellhaus refused, claiming the information was confidential.

Salvatore sued Edward. Soon after, Salvatore died and the executrix of his estate filed a separate action against Nellhaus asserting what the complaint termed “malpractice,” but which the plaintiff initially described as a violation, “while purportedly acting as counsel for the partnership, [of] the obligations [Nellhaus] had as counsel to Salvatore, a partner in the partnership.”⁴⁸ Nellhaus successfully moved to dismiss the malpractice claim on the ground that “as attorney for the partnership, he owed no enforceable duty to Salvatore.”⁴⁹ The executrix appealed, and the appellate court reversed the trial court’s dismissal of the malpractice claim by reinstating the claim and restating it as a breach of

43. 733 N.E.2d 133 (Mass. App. Ct. 2000).

44. *Id.* at 135.

45. *Id.* at 141.

46. *Id.* at 136.

47. *Id.*

48. *Id.*

49. *Id.*

fiduciary duty claim.⁵⁰

2. *Analysis*.—Of the three cases considered by this Article, *Cacciola* is most similar to *Fassihi*. The cases are factually different in that *Fassihi* involved the ouster of one fifty percent stockholder by another, while *Cacciola* involved a somewhat more benign, “secret” acquisition by one partner of an interest that should have first been made available to the partnership. As to the issue of the lawyer’s role, however, the cases have conceptual similarities. In both cases, a disgruntled stakeholder alleged that the lawyer actively assisted another stakeholder in increasing his ownership of the business at the disgruntled stakeholder’s expense.

Cacciola, like *Fassihi*, began with the question of whether or not the lawyer and disgruntled stakeholder had an attorney-client relationship in order to determine whether or not the stakeholder’s estate had a valid claim for legal malpractice against Nellhaus.⁵¹ Based on the allegations of Salvatore’s estate, the court found neither an express relationship between Salvatore and Nellhaus nor an instance of Salvatore’s having relied upon Nellhaus’s advice which might give rise to an implied attorney-client relationship.⁵² The *Cacciola* court also specifically distinguished Massachusetts law from cases in other jurisdictions in which courts have recognized attorney-client relationships between lawyers and individual stakeholders of small, closely held entities simply by virtue of the lawyer’s representation of the entity.⁵³

After finding the malpractice claim inapplicable, the court could have simply affirmed the lower court’s decision to grant summary judgment. Instead, drawing upon *Fassihi* and dicta from a prior Massachusetts Supreme Judicial Court case, *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings, & Berg, P.C.*,⁵⁴ the court implied an additional claim for breach of fiduciary duty against Nellhaus from the estate’s complaint.⁵⁵ This judicial activism might be read as a determined effort by the appellate court to address and define a duty alluded to but not formally upheld in *Schaeffer*, or as the court’s concern that Nellhaus’s allegedly reprehensible behavior might otherwise go unpunished due to poor pleading, or both. In any event, the court found in *Fassihi* abundant guidance for determining both whether a fiduciary relationship existed between Salvatore and Nellhaus and how the accompanying duty might have been breached.

In making the first determination, the *Cacciola* court quoted directly from *Fassihi*:

[i]nstances in which the corporation attorneys stand in a fiduciary relationship to individual shareholders are obviously more likely to

50. *Id.* at 141.

51. “In order to prove a claim of legal malpractice, the plaintiff must show that the defendant owed him a duty of care arising from an attorney-client relationship.” *Id.* at 137.

52. *Id.*

53. *Id.*

54. 541 N.E.2d 997 (Mass. 1989).

55. *Cacciola*, 783 N.E.2d at 137.

arise where the number of shareholders is small. In such [circumstances] . . . the corporate attorneys, because of their close interaction with a shareholder or shareholders, simply stand in confidential relationships in respect to both the corporation and individual shareholders.⁵⁶

Then, noting simply that partnerships are similar to close corporations and that Salvatore was an equal twenty-five percent partner in the partnership, the court concluded that Nellhaus may indeed have owed Salvatore a fiduciary duty.⁵⁷ In doing so, the court suggested this duty may exist whenever an entity has a small number of stakeholders. To support this proposition, the court cited dicta in *Schaeffer* as standing for the even broader proposition that “an attorney for a partnership owes a fiduciary duty to each partner.”⁵⁸

As for the nature and breach of the duty, the *Cacciola* court looked first to the assertions of the plaintiff in *Fassihi* who claimed that as a fifty percent shareholder, he trusted that his corporation’s lawyer would treat him with “the same degree of loyalty and impartiality extended to the other shareholder” and that the lawyer violated this trust by failing to disclose his dual representation of both the corporation and the other shareholder and by helping to terminate the plaintiff shareholder’s association with the corporation.⁵⁹ Linking the facts in *Fassihi* to the case at hand, the court then stated:

The allegations set forth in the plaintiff’s complaint resemble those at issue in *Fassihi*. Salvatore, as an equal twenty-five percent partner, alleged that “although the defendant . . . , as counsel to the partnership, had obligations to Salvatore, as one of the partners . . . to keep Salvatore informed as to significant transactions affecting the partnership, nevertheless, [the] defendant . . . did not inform Salvatore about Edward’s negotiations and his subsequent purchase of Anthony’s former interest . . .” Moreover, the defendant “refused to provide Salvatore with any details of the purchase by Edward,” . . .⁶⁰

In *Cacciola*, the fiduciary duty of “loyalty and impartiality” owed by the lawyer seemed to consist of, at the very least, a duty of disclosure of significant transactions affecting the entity. Given the size of the *Cacciola* partnership and the nature of the estate’s allegations regarding the behavior of Nellhaus, the court found that a claim for breach of fiduciary duty should withstand dismissal.⁶¹

Again, the court could have stopped here. The *Fassihi* court found a breach of fiduciary duty claim applicable to both the lawyer’s alleged failure to disclose information that affected the plaintiff/disgruntled stakeholder and his alleged

56. *Id.* at 138 (quoting *Fassihi v. Sommers, Schwartz, Silver, Schwartz, & Tyler, P.C.*, 309 N.W.2d 645, 649 (Mich. Ct. App. 1981) (alterations in original)).

57. *Id.*

58. *Id.* at 137 (quoting *Schaeffer*, 541 N.E.2d at 1002).

59. *Id.* at 138 (quoting *Fassihi*, 309 N.W.2d at 648).

60. *Id.*

61. *Id.*

active participation “in terminating plaintiff’s association with the corporation” and using a contract to the plaintiff’s detriment.⁶² The *Cacciola* court used the lawyer’s breach of fiduciary duty to encompass only Nellhaus’s failure to disclose, but suggested a separate theory of liability—“aiding and abetting Edward’s breach of his fiduciary duty to Salvatore”—that Salvatore’s estate could have asserted to cover Nellhaus’s participation in Edward’s purchase of Anthony’s share.⁶³

In explaining the basis for such a claim, the court pointed out that partners owe to each other a duty of “utmost good faith and loyalty” and even more so in this case “because of their familial relationship.”⁶⁴ Accordingly, Edward owed Salvatore a fiduciary duty that he breached when he secretly purchased Anthony’s interest. In linking Nellhaus to Edward’s improper behavior, the court cited *Spinner v. Nutt*,⁶⁵ a Massachusetts Supreme Judicial Court case, for the circumstances under which a person may be liable for participating in a fiduciary’s breach. Liability arises when a person “knew of the breach and actively participated in it such that he or she could not reasonably be held to have acted in good-faith.”⁶⁶ Nellhaus then could be liable not only for the breach of his own duty to Salvatore, but also for his involvement in Edward’s breach of duty so long as, presumably, he would be unable to demonstrate that he reasonably believed his advice to Edward and his work on the transaction was appropriate.

Although *Cacciola* borrowed heavily from *Fassihi*, it appears that Massachusetts courts have a significantly more expansive view of attorney liability in the *Fassihi* Scenario. According to *Cacciola*, a lawyer automatically owes a fiduciary duty to each stakeholder of a client that is a close corporation, partnership or other similar entity. Furthermore, an attorney encountering a *Fassihi* Scenario might also face liability for aiding and abetting one individual stakeholder’s breach of fiduciary duty to another stakeholder, even in the absence of a relationship with the disgruntled stakeholder.

B. Chem-Age Industries, Inc. v. Glover⁶⁷

1. *Facts*.—The most recent of the three cases discussed in this Article is a South Dakota Supreme Court case which involved a shady business venture initiated by an entrepreneur named Dahl. Dahl convinced two businessmen, Pederson and Shepard, to invest in a business he was starting called Chem-Age Industries.⁶⁸ According to their agreement, the investors would contribute cash,

62. *Fassihi*, 309 N.W.2d at 648.

63. *Cacciola*, 733 N.E.2d at 139.

64. *Id.*

65. 631 N.E.2d 542 (Mass. 1994).

66. *Id.* at 546.

67. 652 N.W.2d 756 (S.D. 2002).

68. *Id.* at 761.

arrange loans for the business, and serve as its Board of Directors.⁶⁹ Dahl would act as its chief executive officer responsible for day-to-day operations.⁷⁰

The investors gave Dahl some money up front in exchange for a promise of shares, but insisted that Dahl get an attorney to formally set up a corporation before going any further.⁷¹ Dahl engaged Glover, an attorney with whom he had worked on various transactions and lawsuits during the previous twenty years, to do the work.⁷² Glover prepared the necessary paperwork, which listed Pederson and Shepard as incorporators and Glover as registered agent of the corporation, and in November 1997, the business was incorporated as Chem-Age Industries, Inc. (“Chem-Age”).⁷³ After this, Pederson obtained a large loan for Chem-Age and the business began purchasing equipment.⁷⁴ After handling the incorporation, Glover acted as Chem-Age’s attorney on at least one other matter—a lawsuit filed against it—and occasionally held himself out as its attorney in conversations with outside parties.⁷⁵

By early fall of 1998, Pederson and Shepard began to notice that Dahl was accumulating large balances on company credit cards for what appeared to be personal expenses and became suspicious that he was swindling them.⁷⁶ They set up a meeting with Dahl and Glover at which they were surprised to learn not only that Dahl and Glover believed Dahl alone owned Chem-Age, but also that the two were in the process of negotiating the sale of all of the assets of Chem-Age to another company.⁷⁷ Dahl told Pederson and Shepard that they would be repaid for their investments out of the proceeds from the sale of Chem-Age’s assets.⁷⁸

Needless to say, litigation ensued against both Dahl and Glover. The suit against Glover, brought by Chem-Age as an entity and Pederson and Shepard individually, asserted several different claims including legal malpractice and breach of fiduciary duty.⁷⁹ Glover moved successfully for summary judgment on these two claims on the ground that he had only represented Dahl and, therefore, owed no duties to Pederson, Shepard or Chem-Age.⁸⁰ Glover maintained that shortly after incorporation Dahl had told him that Pederson and Shepard were no longer interested in the business and that Dahl would run Chem-Age as a sole proprietorship.⁸¹ The plaintiffs appealed raising several questions relating to the nature of the duties Glover owed to them and whether Glover had breached any

69. *Id.* at 761-62.

70. *Id.*

71. *Id.* at 761.

72. *Id.*

73. *Id.* at 762.

74. *Id.*

75. *Id.* at 767.

76. *Id.* at 762.

77. *Id.*

78. *Id.*

79. *Id.* at 761.

80. *Id.* at 763, 767.

81. *Id.* at 776.

of the duties owed.⁸²

2. *Analysis.*—The *Chem-Age* court's first task in addressing what duties Glover owed, and to whom, was to attempt to sort out exactly who Glover represented. After considering Glover's role in setting up the corporation and the fact that he continued to perform work and occasionally held himself out as working on behalf of Chem-Age after its incorporation, the court was persuaded that Glover may have represented the corporation and that the trial court erred in granting summary judgment to the contrary.⁸³ The court was unpersuaded, however, by Pederson and Shepard's assertion that Glover represented each of them individually because Glover simply had too little direct contact with them for either to have reasonably believed he was represented by Glover. Accordingly, the court found that Glover may have owed duties arising from an attorney-client relationship to Chem-Age, but not to the investors.⁸⁴

While more could be written just on these findings, what makes *Chem-Age* important for purposes of this Article is the considerable time the court spent discussing three "nonclient," fiduciary-based claims Pederson and Shepard might have had against Glover as Chem-Age's attorney. The first, which the court termed a Nonclient Third-Party Beneficiary claim, was technically a claim for negligence (i.e. a breach of duty of care), and not breach of a fiduciary duty.⁸⁵ However, it is worth considering here, given the context in which it was brought—Pederson and Shepard were not really questioning Glover's competence in incorporating Chem-Age, but rather his failure to protect them as constituents of the entity. In this way, this claim is very similar to the fiduciary claims brought in other cases considered herein.⁸⁶ In fact, it is not uncommon for stakeholders suing entity attorneys to use negligence claims to encompass breach of fiduciary duty claims and vice-versa.⁸⁷

In essence, the Nonclient Third Party Beneficiary theory provides that in certain circumstances a lawyer owes a duty of care to a nonclient when the nonclient is either invited or intended to benefit from the lawyer's services to his or her client.⁸⁸ In the case at hand, Pederson and Shepard might claim that they were invited to rely individually on Glover's services to the corporation or that Dahl intended that Glover's representation benefit them primarily and could then assert a valid legal malpractice claim against Glover.

While the *Chem-Age* court was intrigued enough by this theory of liability to spill considerable ink discussing it, the court ultimately found that Pederson and Shepard had not presented sufficient evidence to support it as a technical matter under the standards set forth for such a claim in section 51 of the

82. *Id.* at 763.

83. *Id.* at 768.

84. *Id.*

85. *Id.* at 769.

86. Third party negligence claims were also asserted by the plaintiffs in *Cacciola*, *supra* Part II.A, and *Richter v. Van Amberg*, *supra* Part II.C.

87. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. c (2000).

88. *Id.* § 51.

Restatement (Third) of the Law Governing Lawyers.⁸⁹ Clearly, other concerns also influenced the court's decision. The court laid out several policy reasons to explain the court's reluctance to relax the rule of strict privity in attorney malpractice cases:

First, the rule preserves an attorney's duty of loyalty to and effective advocacy for the client Second, adding responsibilities to nonclients creates the danger of conflicting duties Third, once the privity rule is relaxed, the number of persons a lawyer might be accountable to could be limitless Fourth, a relaxation of the strict privity rule would imperil attorney-client confidentiality.⁹⁰

These policy reasons are nearly identical to the ones cited in cases rejecting the availability of a breach of fiduciary claim in the *Fassihi* Scenario. The court also looked at the nature of the services Glover provided—primarily setting up the corporation—and contrasted it with a scenario where instead of just preparing paperwork, he was called upon to advise and warn “individual constituents of all the consequences and dangers inherent in investing in a corporation.”⁹¹ Considering Glover's role and contact with Pederson and Shepard, the court did not see justification for providing them with a legal malpractice claim.⁹²

Next, the court turned to whether Glover owed and breached a fiduciary duty to Pederson and Shepard even though he did not represent them. At the outset, it stated that no South Dakota court had previously recognized the claim of breach of fiduciary duty “involving lawyers and nonclients,” although it acknowledged that other jurisdictions had, including some “in the corporate sphere.”⁹³ As an example, the court cited *Fassihi*.⁹⁴ While not discrediting *Fassihi*, the test the *Chem-Age* court found in South Dakota caselaw for determining whether a fiduciary duty existed was significantly more extensive than *Fassihi*'s “reposed trust and confidence” standard:

To ascertain a fiduciary duty, we must find three things: (1) plaintiffs reposed “faith, confidence and trust” in Glover, (2) plaintiffs were in a position of “inequality, dependence, weakness, or lack of knowledge” and, (3) Glover exercised “dominion, control or influence” over plaintiffs' affairs.⁹⁵

Perhaps because of this, the court found no fiduciary relationship between Glover and the stakeholders. “Pederson and Shepard have submitted no evidence to show how they were in a confidential relationship with Glover, where they depended on him specifically to protect their investment interests, and where

89. *Chem-Age*, 565 N.W.2d at 771.

90. *Id.* at 769 (citations omitted).

91. *Id.* at 770-71.

92. *Id.* at 771.

93. *Id.* at 772.

94. *Id.* at 773.

95. *Id.* at 772 (citation omitted).

Glover exercised dominance and influence over their business affairs.”⁹⁶ Further, “[a]side from simple avowals that they believed Glover was watching out for their interests, their claim that Glover was entrusted with explicit responsibility for their investments is ‘factually unsupported.’”⁹⁷ In analyzing the stakeholders’ claim in this way, *Chem-Age* differs sharply from *Cacciola*, which seemed to imply that a fiduciary duty extending from the lawyer to stakeholders exists whenever a lawyer represents a closely held entity. It differs from *Fassihi* as well not only by using a more exacting standard, but by requiring evidence of reliance beyond just simple avowals. *Fassihi*’s appeal might very well have been unsuccessful had it been judged by the *Chem-Age* court.

Glover, however, was not out of the woods yet. As in *Cacciola*, the *Chem-Age* court moved immediately on to consider whether Glover might be liable for “aiding and abetting” a breach of a fiduciary duty owed to the disgruntled stakeholders by Dahl, even though Pederson and Shepard apparently never alleged this themselves.⁹⁸ Once again, the *Chem-Age* court used a different and arguably more onerous standard. While the *Cacciola* court had prior state caselaw to rely upon, *Chem-Age* looked instead to the Restatement (Second) of Torts section 876(b), which provides generally that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other,”⁹⁹ and to *Granewich v. Harding*,¹⁰⁰ a 1999 Oregon Supreme Court case which applied this Restatement provision to the *Fassihi* Scenario.¹⁰¹ In *Granewich*, the attorney helped controlling shareholders squeeze out a minority shareholder by advising and assisting them to take certain steps specifically designed to dilute the minority shareholder’s interest (for example, amending the corporation’s bylaws to eliminate certain voting requirements that protected the minority shareholder’s interest from dilution).¹⁰² The *Granewich* court overturned a lower court’s decision that the minority shareholder could not bring a claim for aiding and abetting the majority shareholders’ breach of their fiduciary duty to him against the attorney in “the absence of any duty flowing directly from the lawyers to plaintiff.”¹⁰³

The *Chem-Age* court had no difficulty finding that Dahl’s behavior, as alleged by the plaintiffs, clearly breached fiduciary obligations Dahl owed to the company and its investors.¹⁰⁴ Nor did the court have much doubt that material questions of fact existed as to whether Glover substantially assisted Dahl in

96. *Id.* at 773.

97. *Id.*

98. *Id.*

99. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

100. 985 P.2d 788 (Or. 1999).

101. *Chem-Age*, 652 N.W.2d at 773-74.

102. *Granewich*, 985 P.2d at 791-92.

103. *Id.* at 790, 794 (citing *Granewich v. Harding*, 945 P.2d 1067 (Or. Ct. App. 1997)).

104. *Chem-Age*, 652 N.W.2d at 774.

breaching those obligations.¹⁰⁵ Its concern, again policy-driven, was whether it was wise to hold Glover partially responsible for Dahl's use of his services. Holding attorneys liable in this way, the court posited, "poses both a hazard and a quandary for the legal profession."¹⁰⁶ Echoing the concerns it expressed earlier when considering the Nonclient Third Party Beneficiary claim, the court cautioned that overbroad liability for attorneys could affect the quality of legal services in this context, as attorneys might modify, or refrain from providing, advice on matters that affect the rights of third parties.¹⁰⁷ These "self protective reservations" hurt the attorney's client by depriving it of competent, unfettered advice from its legal counsel.¹⁰⁸ At the same time, the court acknowledged that the right to unfettered advice is not an absolute one—"lawyers should not be free to substantially assist their clients in committing tortious acts."¹⁰⁹

The court concluded that these competing concerns could be reconciled through the strict application of Restatement section 876. First, section 876 requires that the attorney "substantially" assist or encourage a breach of the fiduciary duty.¹¹⁰ To be implicated, the attorney must provide "substantial assistance" to the actual breach of the duty—merely acting as a scrivener or providing routine legal services to someone who then uses them to breach a duty is insufficient.¹¹¹ As an example, the court noted that in *Granewich* the lawyer did more than just advise the controlling shareholders about their options but actually participated in the wrongful acts by making misrepresentations and amending the bylaws in a way that violated the law.¹¹² Second, the attorney must *know*—actually or constructively—of the fiduciary's role as fiduciary and that the fiduciary's conduct "contravenes a fiduciary duty."¹¹³ Constructive knowledge might suffice especially when the aider and abettor have maintained a long-term or in-depth relationship with the fiduciary.¹¹⁴ When applied correctly, the court believed that the standard would protect a lawyer from meritless claims by every stakeholder disadvantaged by the lawyer's advice.¹¹⁵

In the aiding and abetting claim, the *Chem-Age* court at last found a hook on which Pederson and Shepard could potentially hang their hats. Given the facts at hand, the court found that Glover's participation in the formation of the corporation, acquiescence in Dahl's treatment of the business as a one-man operation, and his long term relationship with Dahl, provided reason enough to proceed further on the questions of whether Glover knew or should have known

105. *Id.* at 776.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

111. *Chem-Age*, 652 N.W.2d at 774-75.

112. *Id.* at 775.

113. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979)).

114. *Id.*

115. *Id.* at 774.

of Dahl's fiduciary duty to the duped investors and whether he substantially assisted in the breach of that duty.¹¹⁶ This holding then suggests, as *Granewich* did, an alternative way to find an attorney liable to stakeholders she does not represent and to whom she does not owe a fiduciary duty. The *Chem-Age* court's measured and careful review of three separate nonclient, fiduciary-based claims makes it an important update to *Fassih*.

C. Richter v. Van Amberg¹¹⁷

1. *Facts*.—At issue in this New Mexico federal district court case were the actions of a lawyer who represented a real estate development partnership called Santa Fe Partners II ("SFP"). SFP had two, clearly unequal, partners—Gibbens and Richter. Gibbens provided most of the capital for the venture and consequently was largely in control. SFP's partnership agreement designated Gibbens as the managing partner and provided that Richter was entitled to twenty percent of the partnership's profits only after Gibbens had recovered his initial investment.¹¹⁸

The opinion in this case does not set forth the rest of the facts very clearly. What is clear, however, is that the relationship between Gibbens and Richter ultimately began to fracture. Gibbens believed that Richter had deceived him in taking an undisclosed commission on certain property, presumably associated with the partnership and was also disappointed by Richter's general performance.¹¹⁹ Gibbens approached the partnership's lawyer, Van Amberg, about representing him personally and, in the course of so doing, expressed his dissatisfaction with Richter and his desire to dissolve SFP to avoid paying Richter any profits.¹²⁰ Van Amberg declined to represent Gibbens, citing his obligations to SFP as an entity, but continued to represent the partnership and said nothing to Richter.¹²¹

Subsequent to this, Van Amberg facilitated a sale of some of the partnership's property (the "MAH Sale"). Gibbens insisted that it be done without Richter's knowledge or consent and technically, Richter's consent was not required under SFP's partnership agreement.¹²² When Richter's consent to the MAH Sale later became necessary to complete its closing (and presumably Richter objected because he had not yet received any profits from the venture), Van Amberg brokered an accommodation between Richter and Gibbens which allowed the sale to go forward.¹²³ After the MAH Sale, Gibbens sued to dissolve

116. *Id.* at 776.

117. 97 F. Supp. 2d 1255 (D.N.M. 2000).

118. *Id.* at 1259.

119. *Id.* at 1262.

120. *Id.*

121. *Id.*

122. *Id.* at 1259.

123. *Id.*

SFP.¹²⁴ Richter counterclaimed and the partners ultimately settled the dissolution of the partnership when Richter accepted payment of \$110,000.¹²⁵

The case at issue arose out of claims Richter later asserted against Van Amberg, after learning that Gibbens and Van Amberg had spoken about Gibbens's plans to dissolve SFP prior to the MAH Sale. Richter sued Van Amberg asserting a catalog of claims, including legal malpractice, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty.¹²⁶ Underlying all of Richter's claims were his contentions that Van Amberg facilitated the MAH Sale while aware that Gibbens wanted to terminate the partnership without compensating Richter and failed to disclose this to Richter. Richter claimed he would not have agreed to the MAH Sale had he known Gibbens' intentions.¹²⁷

Van Amberg countered that Richter's contentions did not amount to any wrongdoing on Van Amberg's part and moved for judgment as a matter of law.¹²⁸ Van Amberg claimed that Gibbens, as SFP's managing partner, had full authority under the partnership agreement over partnership matters, without any right of consent by Richter, and, therefore, Van Amberg only owed a duty of disclosure to Gibbens.¹²⁹ Moreover, Van Amberg claimed that ethical rules prohibited him from disclosing what he learned about Gibbens's desire to dissolve the partnership to Richter because it was a communication by a person "who consults a lawyer with a view to obtaining professional legal services."¹³⁰

2. *Analysis.*—The *Richter* court granted Van Amberg's motion, agreeing that, even assuming Richter's version of the facts, there was no legally sufficient basis to support a finding for Richter on any of his claims.¹³¹ What is distinctive about the *Richter* opinion, especially when compared with *Cacciola* and *Fassihi*, is its analytical approach to determining whether Van Amberg owed a fiduciary duty to Richter. In concluding he did not, the court never contemplated that a fiduciary relationship might exist between the two, separate and apart from an attorney-client relationship. In this way, *Richter* bears very little resemblance to *Fassihi*. The fact that the *Richter* court employed several different and contradictory tests for determining Van Amberg's obligations to Richter, however, prevents it from representing a clear alternative to the *Fassihi* approach.

It is significant that the *Richter* court began its analysis of Richter's breach of fiduciary duty claim by quoting from a treatise on legal malpractice—"[the] breach of fiduciary duty claim is also one for legal malpractice."¹³² For in this

124. *Id.*

125. *Id.*

126. *Id.* at 1255-56.

127. *Id.* at 1259.

128. *Id.* at 1258.

129. *Id.* at 1259.

130. *Id.* at 1262.

131. *Id.* at 1258.

132. *Id.* at 1261 (citing 2 MALLEN & SMITH, LEGAL MALPRACTICE § 14.1.5 (4th ed. 1998 Supp.)).

court's opinion, such a claim was inextricably tied to an attorney-client relationship. For Richter, this meant the court would not recognize his claim for breach of fiduciary duty against Van Amberg unless Richter demonstrated an attorney-client relationship existed between them.

The court provided support for this approach, and distanced itself from *Fassihi*, by citing two recent New Mexico cases in which courts had held that the attorney for a closely-held entity owed no special duties to its constituents by virtue of that representation.¹³³ Most compelling was the decision in *Delta Automatic Systems, Inc. v. Bingham*,¹³⁴ a 1998 case, in which the court considered claims by the two sole shareholders of a corporation that the corporate attorney owed them a special duty because he represented them in matters apart from the corporation. The court stated unequivocally: "In representing Delta, Defendants did not owe the Quintanas, as shareholders, any special duty above and beyond their duties to the corporation. This is so even though the Quintanas were the sole shareholders of Delta and Defendants knew that the Quintanas' livelihood depended on Delta's success."¹³⁵ Had the *Richter* court stopped here, we could simply assume that New Mexico law on this issue is similar to other jurisdictions which have concluded that attorneys owe no fiduciary or other duties to the stakeholders of a closely-held entity absent evidence of a separate attorney-client relationship between them.

Instead, however, the *Richter* court also pointed to *Rice v. Strunk*,¹³⁶ a 1996 decision of the Indiana Supreme Court, which provided that partnerships should be treated differently than corporations for purposes of determining who the attorney represents, as guidance in reaching its decision. This approach, while contrary to Rule 1.13 of the MRPC and the law in the vast majority of U.S. jurisdictions, is still followed in a few states. It employs the aggregate, rather than entity, theory of representation when analyzing a lawyer's representation of a partnership and other unincorporated associations, holding that an attorney who represents a partnership actually represents each partner jointly rather than the partnership as an entity. As the court in *Rice* noted, however, pursuant to partnership law, partners may essentially contract away this fiduciary and legal relationship with the entity's attorney by entering into a partnership agreement that delegates their rights to the management of the partnership to a manager or managing partner.¹³⁷ Following this logic, the *Richter* court found that, indeed, Richter might have had individual claims against Van Amberg had he not entered into a partnership agreement with Gibbens delegating full governing authority on all partnership matters to Gibbens.¹³⁸ Because he did so, the court reasoned, Van Amberg's fiduciary obligations of confidentiality and undivided loyalty flowed directly to the partnership as represented by its managing partner and not to

133. *Id.* at 1263.

134. 974 P.2d 1174 (N.M. Ct. App. 1998).

135. *Id.* at 1178 (cited in *Richter*, 97 F. Supp. 2d at 1263-64).

136. 670 N.E.2d 1280 (Ind. 1996).

137. *Id.* at 1288-89.

138. *Richter*, 97 F. Supp. 2d at 1263.

either of the partners individually.¹³⁹

This purely contractarian approach differs from *Fassihi* in which such obligations are not automatically bestowed upon stakeholders, but created through the relationship that the individual stakeholder has with the attorney. However, it also is clearly inconsistent with the *Richter* court's simultaneous use of *Delta* as controlling precedent.

In the absence of a fiduciary relationship with Richter, Van Amberg's behavior, which initially might have appeared problematic, is viewed in a different light. The law only imposed on him a duty to his client—the partnership. Citing New Mexico's version of Model Rule 1.13, the court stated, "As the partnership lawyer, Mr. Van Amberg's responsibility was to the entity, specifically the managing partner."¹⁴⁰ Therefore, Van Amberg's "secret" facilitation of the MAH Sale was not wrongful as Gibbens, pursuant to the partnership agreement, "had the authority to convey partnership real property . . . on behalf of the partnership without Plaintiff Richter's consent."¹⁴¹ Van Amberg's non-disclosure of Gibbens's intent to dissolve the partnership without giving Richter any profits was also appropriate because Van Amberg only had a duty of disclosure to the partnership, not individual partners. Further, and perhaps more plausibly, because Gibbens disclosed it in the course of requesting Van Amberg to represent him personally, it was a confidential attorney-client communication.¹⁴²

Clearly, the *Richter* court was convinced that the facts, as much as the law, justified its decision in this case. Even under Richter's version of the facts, the court believed that Van Amberg's behavior lined up with applicable professional standards. Richter and Gibbens were both sophisticated businessmen who retained separate counsel during their disputes.¹⁴³ When Gibbens approached Van Amberg about personal representation, Van Amberg declined and told Gibbens to retain separate counsel.¹⁴⁴ When Van Amberg participated in the negotiations between Richter and Gibbens it was at the request of Richter's counsel.¹⁴⁵ Towards the end of its opinion, the court revealed an unwillingness to drag Van Amberg into Richter's sour break-up with Gibbens. It noted that both Gibbens and Richter "had colorable claims against one another for breach of fiduciary duty" and "have strong personalities" and "it is highly unlikely that Mr. Van Amberg could have predicted what either would do regarding their ongoing partnership disputes."¹⁴⁶ Accordingly, the court quickly dispensed of Richter's final claim that the lawyer aided and abetted Gibbens's breach of fiduciary duty to Richter, noting again that Van Amberg's actions met

139. *Id.*

140. *Id.* at 1263 (citing N.M. R. PROF. CONDUCT 16-113 (A)).

141. *Id.* at 1262-63.

142. *Id.* at 1262.

143. *Id.* at 1264.

144. *Id.* at 1266.

145. *Id.* at 1264.

146. *Id.* at 1266.

professional standards and that “no evidence suggests that Mr. Van Amberg’s non-disclosure was the proximate cause of damages to Plaintiff Richter.”¹⁴⁷

At the end of the day, it is difficult for the reader to decipher on what principle the *Richter* decision rests. Was it that Van Amberg, as lawyer for the partnership, owed no duties to Richter, that Richter contracted away any duties Van Amberg owed to him, that Van Amberg’s adherence to applicable professional standards absolved him of liability, or some combination of these three? The answer is unclear. Notwithstanding, this case is significant for its discussion of several approaches to the question of the existence of a fiduciary duty in the *Fassihi* Scenario not discussed in *Fassihi*, *Cacciola* or *Chem-Age*.

III. LESSONS LEARNED

So what helpful guidance might be gleaned from these “descendants of *Fassihi*” for those who represent closely held businesses? Interests among business partners frequently diverge and most significant decisions a business makes have the potential to affect constituents differently. Must lawyers in this arena practice with an excess of caution, with one eye constantly on the stakeholder who is getting the short end of the stick?

A. *Where Does the Law Stand?*

The initial question posed by this Article was: Under what circumstances is a lawyer who represents a closely held entity potentially susceptible to fiduciary-type claims asserted by individual, nonclient stakeholders? The cases analyzed in Part II demonstrate that there still is no uniformity of opinion on this issue. This is especially true with the respect to the narrower question of how widely has *Fassihi*’s central proposition been accepted. At one end of the spectrum is a case like *Cacciola* in which the language of the court’s opinion insinuates that a lawyer owes a fiduciary duty to non-client stakeholders whenever the lawyer represents a closely-held entity. At the other end of the spectrum is the *Richter* court which, apparently, would not recognize a claim for breach of fiduciary duty in the absence of an established attorney-client relationship. Somewhere in the middle is *Chem-Age* which, like *Fassihi*, requires the demonstration of a relationship of trust, not quite arising to the level of an attorney-client relationship. Even on the question of what constitutes a relationship of trust, courts apply varying standards as a comparison of *Chem-Age* and *Fassihi* indicates. The recent cases are representative of the diversity of viewpoints expressed by courts that have considered this claim during the twenty years since the *Fassihi* decision.¹⁴⁸

147. *Id.*

148. *E.g.*, *Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627 (Ct. App. 1991) (considering breach of fiduciary claim but finding absence of relationship of trust between lawyer and constituent); *Rose v. Summers, Compton, Bells, & Hamberg, P.C.*, 887 S.W.2d 683 (Mo. Ct. App. 1994) (finding lawyer for limited partnership not liable and owed no fiduciary duty to limited partners); *Arpadi v. MSP Corp.*, 628 N.E.2d 1335 (Ohio 1994) (finding lawyer for limited

An important corollary issue for those jurisdictions which acknowledge the existence of a fiduciary duty in this context is: what does the duty consist of? Is it identical to the fiduciary duty lawyers owe clients, less comprehensive or altogether different? The fiduciary duty resulting from an attorney-client relationship is really an amalgam of several separate obligations, including “safeguarding the client’s confidences and property; avoiding impermissible, conflicting interests; dealing honestly with the client; adequately informing the client; following instructions of the client; and not employing adversely to the client powers arising from the client-lawyer relationship.”¹⁴⁹ The limited treatment this issue has received suggests that the duty owed to a nonclient stakeholder closely resembles that owed to a client. In *Cacciola*, the duty encompassed Nellhaus’s (the attorney) failure to deal honestly with Salvatore by not informing him “about Edward’s negotiations and his subsequent purchase of Anthony’s former interest.”¹⁵⁰ In *Fassihi*, it was the lawyer’s behavior in acting to deplete Fassihi’s property (i.e. his economic interest in the corporation).¹⁵¹ The *Chem-Age* court discussed the fiduciary duty to a nonclient as though it were the duty owed to a client.¹⁵² Other cases and the Restatement have insinuated the same.

One way in which the three recent cases stand apart from *Fassihi*, which is also an indication of how the jurisprudence has developed, is that they each address a separate, additional claim: the attorney’s ‘aiding and abetting’ of another stakeholder in breaching his fiduciary duty to the plaintiff. This is not because the facts in *Fassihi* are less compelling than the other cases for such a claim, but rather because it is only in the last twenty years that courts have begun to recognize the liability of an attorney for this tort.¹⁵³ In fact, it is only since *Granewich v. Harding*,¹⁵⁴ a 1999 decision of the Oregon Supreme Court, that this type of claim was upheld in a case involving the Fassihi Scenario. *Granewich* is partially distinguishable from *Fassihi*, because it involved an attorney who began representation of a corporation only after the majority shareholders had commenced the plan to oust the minority shareholder. The minority shareholder had no direct contact with the attorney and therefore could not reasonably claim that he had established a relationship of trust and confidence with the attorney. This distinction, however, certainly did not stop the *Cacciola*, *Chem-Age*, and *Richter* courts from considering an aiding and abetting claim, in two of the cases

partnership owed duties to limited partners).

149. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (2000) (internal references omitted).

150. *Cacciola v. Nellhaus*, 733 N.E.2d 133, 138 (Mass. App. Ct. 2000).

151. *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 309 N.W.2d 645, 646 (Mich. Ct. App. 1981).

152. *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756 (S.D. 2002).

153. Bryan C. Barksdale, Note, *Redefining Obligation in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 WASH & LEE L. REV. 551, 554 (2001).

154. 985 P.2d 788 (Or. 1999). See *supra* notes 100-03 and accompanying text.

even when the plaintiffs had not initially pleaded it.

The presence of the aiding and abetting claim in the above cases represents a clear, recent trend of courts towards treating it not only as complimentary to the more direct breach of fiduciary duty claim, but, perhaps in many instances, as a better way to determine an attorney's liability in the Fassihi Scenario. There are several possible reasons for this. First, caselaw is better developed as to what duties majority stakeholders owe to minority stakeholders than it is as to what duties an attorney for a closely-held entity owes to individual nonclient stakeholders. Because many Fassihi Scenario cases involve a concomitant breach of duty by a majority stakeholder, the court can move directly on to the more concrete inquiry of whether the attorney knowingly participated in the majority stakeholder's breach rather than having to address whether a fiduciary relationship existed between the attorney and the disgruntled stakeholder and whether the attorney's actions violated this relationship. Along these lines, and as has already been demonstrated above, jurisdictions differ significantly on whether or not, and when, attorneys owe fiduciary duties to nonclients. The aiding and abetting claim addresses the attorney's reprehensible behavior notwithstanding the court's position on these other issues. Finally, as one commentator recently pointed out, liability for breach of a fiduciary duty does not require a mental state and is therefore essentially a strict liability claim.¹⁵⁵ To be liable for aiding and abetting someone else's breach, one must have done so knowingly and therefore this claim may better fit scenarios like those in all three of the recent cases in which the plaintiff seeks redress against the attorney for affirmatively and intentionally acting against his interest.

In summary, whether or not, as well as when, an attorney is susceptible to fiduciary claims in this context continues to be largely dependant upon the jurisdiction in which the attorney practices. It appears, however, that in a growing number of jurisdictions, a lawyer embroiled in a Fassihi Scenario will be susceptible to liability if she knowingly and substantially assists one or more stakeholders in breaching their fiduciary duties to another stakeholder. Other attempts to extend fiduciary type liability, like the nonclient third party beneficiary claim alleged in all three of the recent cases, have generally failed.

B. Possible Responses by the Attorney

Given the judicial uncertainty, it is tempting to seek a straightforward, failsafe answer to this thorny representational dilemma. One particularly risk-averse approach would be for the lawyer to simply not involve herself in matters that adversely impact the interests of one or more stakeholders. This might involve declining to accept representation of closely held businesses where the interests of stakeholders appear to be even remotely at odds, refusing to advise an entity client (including its control group) on decisions that could negatively affect one or more stakeholders and recommending that all affected constituents seek separate counsel whenever any intracorporate dispute arises.

155. Barksdale, *supra* note 153, at 559.

Another possible approach would be for the lawyer to attempt to consider and reconcile the interests of an entity and each of its stakeholders on all decisions. This utilizes the “group” or “aggregate” theory of organizational representation, which some legal commentators and courts have asserted (as *Cacciola* implicitly does) is appropriate when lawyers represent closely held entities.¹⁵⁶ In essence, this approach requires that the lawyer treat each stakeholder as a co-client pursuant to Model Rule 1.7 and refrain from further representation if the interests of these co-clients are “fundamentally antagonistic.” Because the lawyer would owe representational duties to each stakeholder, when faced with a potential Fassihi Scenario, she could not assist an entity or control group in taking action adverse to any one stakeholder.

While accomplishing the lawyer’s objective of reducing fiduciary liability exposure, these approaches both raise legal and practical problems. The most fundamental of these is that neither approach comports with the “entity” theory of representation embodied in Model Rule 1.13, and its Model Code counterpart EC 5-18, which together are the basis for the standards for professional conduct adopted in every state pertaining to a lawyer’s representation of an organization. The selection of the “entity” theory over the “aggregate” theory by the drafters of the MRPC followed from their conclusions that the former had supplanted the latter in jurisdictions throughout the United States and that treating stakeholders as co-agents of the entity rather than co-clients more accurately reflects basic principles of corporate law.¹⁵⁷ ABA Formal Opinion 91-361 clarified that these principles and the entity theory applies equally to partnerships, closely held entities and other types of associations as it does to corporations.¹⁵⁸ Inherent within Rule 1.13 is the notion that the lawyer, in following the will of the entity as expressed by its “duly authorized constituents,” may assist in a course of action adverse to one or more of the entity’s stakeholders.¹⁵⁹

As a practical matter, following either of the two approaches discussed above as a general rule would hinder a lawyer’s ability to meaningfully and effectively represent closely held business clients. Under either approach, the lawyer would have to tailor her advice to omit the discussion of options that could potentially negatively impact a stakeholder and thus would deprive an entity client of an opportunity to fully consider all options and make fully informed decisions. The “risk-averse” approach would require identifying all situations in which interests potentially diverge—ranging from inherently contentious ones, like the decision

156. “Reality inhibits application of the entity representation rule of the closed corporation.” WUNNICKE, *supra* note 4, at 232; *see also* Lawrence Mitchell, *Professional Responsibility and the Close Corporation: Toward A Realistic Ethic*, 74 CORNELL L. REV. 466 (1989).

157. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *LAW AND LAWYERING* 17.6 to 17.13 (3d ed. 2001).

158. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-361 (1991).

159. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003) (requiring lawyer to explain to constituent that entity is client when lawyer is “dealing with” constituent against whom entity’s interests are adverse).

to involuntarily buy out a minority shareholder, to more apparently mundane tasks like the preparation of organizational documents that supposedly express the *agreement* of stakeholders—and then recusing herself.¹⁶⁰ It is hard to believe a lawyer could ever identify all such situations or that a client would find it valuable to retain a lawyer who did. In the same vein, while under certain circumstances it is either advisable or required that a lawyer for a business recommend that constituents at odds with one another consult separate counsel, in many cases, it is neither required nor helpful to do so, especially when considering the attendant costs, both financial and otherwise, of adding more lawyers to the fray.

Although assisting an entity client to reconcile the interests of its stakeholders is sometimes in the entity's best interests, a purely "aggregate" approach to corporate representation is often unfeasible. Because the lawyer owes duties to multiple clients rather than one, the potential for pervasive and numerous conflicting duties increases with each additional stakeholder. Ostensibly, the lawyer owes obligations of confidentiality to each stakeholder and to the entity itself, which could make communications with any one stakeholder a potential minefield. Additionally, as previously mentioned, the lawyer may feel compelled to impose self protective restrictions on her advice to avoid any chance of impairing one client's interests, which ultimately hinders the development of an open, trustworthy relationship between the lawyer and entity.

C. A Case-by-Case Strategy for Reducing Exposure to Fiduciary Liability

A more appropriate response for containing fiduciary liability should be firmly rooted in applicable caselaw and professional standards. To this end, the recent cases examined in this Article are quite instructive.

The recent cases suggest that the course of dealing that the attorney and client engage in is often a very important factor. For example, in *Chem-Age*, Pederson and Shepard's claim of a fiduciary relationship with Glover failed because there was "no evidence to show how they were in a confidential relationship with Glover, where they depended on him specifically to protect their investment interests, and where Glover exercised dominance and influence over their business affairs."¹⁶¹ Simple avowals that they believed Glover was watching out for their interests were insufficient absent evidence "that Glover was entrusted with explicit responsibility for their investments."¹⁶²

Similarly, in dismissing the notion that Van Amberg owed any duties to Richter individually, the *Richter* court looked to their interactions and found no specific evidence of Richter's reliance on Van Amberg in partnership matters;

160. See *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. Dist. Ct. App. 1994) (considering claim that lawyer breached fiduciary duty to shareholder in preparation of shareholders agreement); see also *Egan v. McNamara*, 467 A.2d 733 (D.C. 1983) (same).

161. *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 773 (S.D. 2002).

162. *Id.*

in fact, Richter retained separate counsel to protect his interests during his negotiations with Gibbens.¹⁶³ The court found Van Amberg's response to Gibbens's request for personal representation telling of how he viewed his relationship with the stakeholders—he declined and referred Gibbens to outside counsel, stating that he could only represent the partnership.¹⁶⁴ Later, he urged Gibbens to disclose certain partnership matters to Richter.

Cacciola, with its insinuation that a fiduciary relationship between an attorney and stakeholder of a closely held entity might be inherent, did not explore how the partners of Cacciola Associates perceived Nellhaus nor point to this as a factor. In a few jurisdictions, course of dealing will not be a factor. One other case, however, is instructive. In *Brennan v. Rufner*, a Florida appeals court affirmed the dismissal of a claim of breach of fiduciary duty by a “disgruntled minority shareholder” against the attorney of a closely-held corporation, after the corporation's other two shareholders voted the minority shareholder out of the corporation using a procedure agreed upon in their shareholders agreement.¹⁶⁵ In concluding that the attorney did not have a fiduciary relationship with the disgruntled shareholder resulting from his preparation of the shareholders agreement, the court found persuasive the fact that the attorney had told the shareholders that he only represented the corporation in drafting the agreement.¹⁶⁶ Defining upfront the nature of the attorney's relationship with the constituents of an entity client is also consistent with several sections of the MRPC, including Rule 1.2 (c), Rule 1.7 and Rule 1.13 (d).

For the most part, the logic in these cases closely resembles the “reasonable expectations” approach adopted in most jurisdictions and by the ABA for dealing with the closely related issue of determining whether an attorney and an individual stakeholder have established a separate attorney-client relationship.¹⁶⁷ This approach looks at the facts of each particular case to determine whether an express or implied relationship has arisen based on the stakeholder's reasonable expectation of the role of the attorney, including whether “there was evidence of reliance by the individual [stakeholder] on the lawyer as his or her separate counsel, or of the [stakeholder's] expectation of personal representation.”¹⁶⁸ Similarly then, an attorney who would like to proactively decrease the likelihood of creating a fiduciary relationship with individual stakeholders should address this issue at the beginning of a representation by clearly stating to each that the attorney will only represent the interests of the business entity and not those of any of the individual stakeholders. This would best be taken care of in writing,

163. *Richter v. Van Amberg*, 97 F. Supp. 2d 1255, 1265 (D.N.M. 2000).

164. *Id.* at 1262.

165. *Brennan*, 640 So. 2d at 143.

166. *Id.* at 146-47; *see also* *Buehler v. Sbardellati*, 41 Cal. Rptr. 2d 104, 108 (1995) (upholding lawyer's limitation of role in formation of limited partnership to merely documenting transaction and not representation of each partner's individual interests).

167. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

168. *Id.*

ideally in an engagement letter.¹⁶⁹ For the risk averse attorney, the letter could go even further and provide that undertaking the engagement in no way creates any type of a fiduciary relationship with any of the stakeholders.

Of course, putting this in writing is one thing and following it is quite another. As several commentators have noted, it is often difficult in the course of representing a closely held entity to separate the entity and its stakeholders.¹⁷⁰ But difficult does not mean impossible. The attorney who wishes to rebut a future contention that she has a fiduciary relationship with any of the entity's stakeholders would be well advised to adhere to "corporate"/"entity" formalities. These formalities include somewhat mundane, yet important, practices like ensuring that direction given by a constituent of the client is consistent with the constituent's authority and has been properly approved by the entity, insisting that constituents adhere to rules and procedures set forth in the entity's governance documents and applicable law and even reinforcing that the entity is the client when communicating with constituents (e.g., by addressing letters to constituents in their official capacities). They also include obeying requirements directly imposed by the MRPC such as explaining the identity of the attorney's client when it is apparent that the entity's interests are adverse to those of one or more of its stakeholders and keeping paramount the best interest of the entity in each and every facet of the representation. Each of the foregoing are examples of sometimes overlooked standards of good corporate legal practice.

Finally, it seems almost too obvious and a little circular to suggest that an attorney can better protect himself from liability associated with a Fassihi Scenario by obeying the law. And yet it should be of some comfort for attorneys to know that courts typically have only upheld the types of claims discussed throughout this Article when the attorney has transgressed or assisted someone to transgress a law either external or, more often, internal (i.e. constitutional law of the entity).

Cacciola is a good example of this point. The attorney for the partnership engineered a transaction that allowed one partner to acquire a deceased partner's interest. What made this otherwise innocuous action improper was that it was carried out in violation of a partnership agreement granting the partnership the first option to purchase the interest. Similarly, in *Chem-Age*, Glover's assisting Dahl in selling the assets of the business might otherwise not have been problematic. But the fact that Glover illegally notarized the signatures of Pederson and Shepard on the corporation's Articles of Incorporation and then facilitated the sale of Chem-Age's assets without observing any corporate formalities seemed to convince the court that the stakeholders might have a viable claim against Glover.

On the other hand, the *Richter* court dismissed all of the claims brought against Van Amberg even though the court believed that Richter had a colorable

169. For an example of language to use in engagement letters in this context, see CHESTER ROHRlich ET AL., *ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES*, at app. 2B (6th ed. 2001).

170. See, e.g., sources cited in *supra* note 156.

claim against Gibbens for breach of fiduciary duty and Van Amberg assisted Gibbens on several matters that Richter alleged to be wrongful. The court noted that Van Amberg's behavior seemed consistent both with applicable ethical standards and SFP's partnership agreement, which designated Gibbens as the managing partner with decision-making authority on almost all partnership matters.

Although the results in these cases are in part a reflection of the jurisdiction in which they were brought, the matter is certainly not out of the attorney's hands. Adherence to those provisions of the MRPC that apply to organizational representation, corporate/entity formalities and applicable law will greatly reduce an attorney's exposure to fiduciary liability with respect to individual stakeholders of an entity client.

NOTES

GLOBAL POSITIONING SYSTEM IMPLANTS: MUST CONSUMER PRIVACY BE LOST IN ORDER FOR PEOPLE TO BE FOUND?

KRISTEN E. EDMUNDSON*

INTRODUCTION

Recent technological advances have allowed the development of a device that can determine the location of a person anywhere in the world instantly and precisely. This device, known as a Global Positioning System (GPS), is available in various shapes and sizes—from backpack-sized devices with centimeter accuracy, to hand-held devices used for navigation on hiking trails with an accuracy of a few meters. Although GPS implants for humans (termed Personal Location Devices (PLDs) by the industry) are not yet on the market, it is only a matter of time before the products will be available. The technology exists for such a device, and at least one company, Applied Digital Solutions (ADS), is poised to market it. The GPS implant device is inserted under the skin using a needle and it remains in place until surgically removed. The implant would communicate its location via radio signals to nearby cellular towers.

One may question the utility of such a device or wonder whether any person would want to have one implanted under his skin. As will be discussed below, the device is being marketed primarily as a personal safety tool—to track a kidnapped child or find an injured, lost, or incompetent adult. However, just beyond these personal safety uses lies a wealth of untapped commercial uses of which the purchaser of a GPS implant may or may not be aware. Imagine receiving a letter in the mail from a clothing store at the local mall stating, “We missed you! We noticed that you were at the mall last Tuesday at 7:14 PM but you did not have the chance to stop by our store. As an incentive to stop by next time, we have included a 10% off coupon for our entire store.” This and other far more annoying commercial intrusions on private life would be available if the

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GPS implant providers decided to sell their customers' location information.¹

Use of the GPS implant product would create privacy issues unlike any encountered before. Who should have access to the location information of the person with the GPS implant? Will this even concern the people who have a GPS chip implanted? Or will the customers simply be anticipating the emergency uses of the technology—for example locating a kidnapped child or a lost Alzheimer's patient? Will the GPS data be encrypted so that it cannot be usefully intercepted when it is transmitted to the end user through wireless communications?

In addition to the strictly locational data generated by GPS, the potential for the type of data that could be stored in GPS implants is limitless. For example, the chip could store health information including body temperature, blood alcohol level, financial data from stores that are visited, and consumer information such as which restaurants are frequented. However, this Note focuses solely on the privacy issues surrounding the GPS data capabilities—i.e., the capacity to determine with accuracy where a person is in the world at any given time. This Note does not discuss the medical aspects of GPS implants—such as whether the implant is safe, or what effect the radio waves could have on the host. This Note does not address legal issues surrounding the use of GPS implants for prisoners or parolees. Nor does it address government use of the implants. It only addresses commercial use of the GPS implants by the public at large.

In light of the often lengthy process required to enact legislation, it is wise to address the privacy concerns surrounding this new technology now, before the product is widely marketed and used. Additionally, the potential threats to privacy are even greater than in previous technologies, such as the Internet or Enhanced 911 cell phones, because the data collected is unlike any other. It can determine the location of the person with the GPS implant with an accuracy of a few feet and the GPS implant has an element of permanency that no other technology has. Once implanted, the GPS chip would need to be removed surgically. The host of a GPS implant would not be able to simply leave the phone behind or get off the Internet to avoid someone capturing personal information.

This Note first provides a background on GPS technology, concentrating on the manner in which GPS implants for humans will function. Secondly, the Note addresses the potential privacy concerns that the use of GPS implants may create, drawing on examples in the cell phone industry and other technologies that use GPS to determine the location of their users. Thirdly, the Note analyzes the existing privacy torts and legislation that address location information privacy, interception of electronic communications, and privacy on the Internet to

1. The reader may recall the opening scenes of the film *Minority Report* where the characters are inundated with custom advertising based on retinal scans. *MINORITY REPORT* (Twentieth Century Fox 2002). Although those advertisements were generated based on personal preferences databases triggered by the retinal scan, a similar phenomenon could occur based on the transmission of GPS information.

determine whether such torts and legislation are applicable to GPS implants. After concluding that the existing legislation and privacy torts are not adequate or applicable, the Note offers suggestions for new legislation that would protect the privacy of GPS implant hosts.

I. GLOBAL POSITIONING SYSTEM (GPS) IMPLANT TECHNOLOGY— WHAT IS GPS AND HOW DOES IT WORK?

A. Overview of GPS

The Global Positioning System (GPS) was originally created by the Department of Defense for use in maneuvering of weapons and troops.² Numerous books and articles have been written on GPS technology in the fields of geography and satellite technology. A recent law review article gives a simple explanation of the way GPS works:

GPS consists of three main components: a space-based component, a control component, and a receiver. The space-based component consists of twenty-four satellites, which orbit the earth while broadcasting a positioning signal. The United States Air Force operates the control component, which consists of tracking facilities that monitor and correct the position of the satellites. The receiver component, which varies greatly in size and expense, uses the GPS signal to calculate its own position.³

A GPS receiver takes the information broadcasted by the satellite and then determines its three-dimensional location (longitude, latitude, and elevation above sea level) through a triangulation calculation.⁴ With the use of Wide Area Augmentation Systems (WAAS) or Differential GPS (DGPS), GPS receivers can calculate their location with an accuracy of a few feet.⁵

GPS receivers are available in vastly different prices and accuracies. They range from a simple hand-held GPS receiver used by hikers to navigate through the forest, to huge contraptions strapped to a person's back with antennae extending a few feet in the air. Generally, the larger and more expensive the unit, the more accurate the GPS reading will be. Extremely precise GPS receivers that have accuracy to within a few centimeters are used by the military, but also by

2. See U.S. Navy, *USNO NAVSTAR Global Positioning System* at <http://tycho.usno.navy.mil/gpsinfo.html> (last visited Nov. 15, 2004).

3. Jeremy Speich, Comment, *The Legal Implications of Geographical Information Systems (GIS)*, 11 ALB. L.J. SCI. & TECH. 359, 361 (2001) (footnotes omitted).

4. Robert Puterski, *The Global Positioning System—Just Another Tool?*, 6 N.Y.U. ENVTL. L.J. 93, 95 (1997) (“By transmitting synchronized digital codes with a specific frequency, and knowing the precise time it takes for that signal to travel a given distance, a position can be calculated.”).

5. Garmin Ltd., *What is GPS?* at <http://www.garmin.com/aboutGPS/> (last visited Nov. 15, 2004) (Garmin is a major manufacturer GPS products.).

city planners, utilities, and sanitary or sewer workers to locate buried cables or pipes. GPS receivers that have an accuracy of a few feet are frequently used for navigation, whether by boat or plane.

More recently, GPS technology has been made available to the general consumer through navigation devices in cars and inclusion in hand-held devices such as cell phones and personal digital assistants (PDAs).⁶ In the case of cell phones, GPS is used to determine a 911 caller's location and allow emergency vehicles to assist the caller, whereas GPS in PDAs or OnStar is used primarily for navigation assistance, although there can be an emergency response component as well.

B. GPS Subdermal Implant

On May 13, 2003, Applied Digital Solutions (ADS) announced that it had developed a working prototype of "what the company believes is the first-ever subdermal GPS 'personal location device' (PLD)."⁸ Although the product is not yet on the market, ADS already sells two other products commercially that demonstrate the viability of the concept. Once on the market, the PLD would likely take the form of the first product, VeriChip combined with the functionality of the second product, Digital Angel.

The first product, named VeriChip, is a "miniaturized radio frequency identification device" which is about the size of a grain of rice and is inserted underneath the skin.⁹ VeriChip stores identification information that is

6. OnStar is the primary example of the use of GPS in vehicles for navigation and public safety purposes. For more information, see <http://www.onstar.com> (last visited Nov. 15, 2004).

7. Throughout this Note, the terms "GPS implant" and "PLD" will be used interchangeably.

8. Press Release, Applied Digital Solutions, *Applied Digital Solutions Announces Working Prototype of Subdermal GPS Personal Location Device* (May 13, 2003) at <http://www.adsx.com/news/2003/051303.html>.

9. *Id.* The Food and Drug Administration (FDA) declined to regulate ADS's VeriChip. Press Release, Applied Digital Solutions, *FDA Ruling—Subdermal VeriChip Is Not a Regulated Medical Device "For Security, Financial, and Personal Identification/Safety Applications"* (Oct. 22, 2002), at <http://www.adsx.com/news/2002/102202.html>; see also Matt Fleischer-Black, *Cosmetic Advocacy*, THE AMERICAN LAWYER, Aug. 2003, 70, 123 (discussing the decision of the FDA's chief counsel, Daniel Troy, not to regulate VeriChip).

[T]he company formally asked the FDA to rule that the agency had no jurisdiction over its product, the VeriChip . . . [I]ts lawyers . . . argued that it shouldn't be regulated because the company hadn't claimed anything about health. Troy agreed. The product did not fall within the agency's jurisdiction of products intended "to affect the structure or function of the body," he wrote in a letter in October 2002—this despite the fact that to be used the chip must be injected. Troy's letter deemed the chip a 'consumer product,' and thus the responsibility of the Consumer Product Safety Commission—which only regulates products after they hit the market.

Id. The wisdom of this ruling, or lack thereof, is left to another author. See also Elaine M. Cochran, *The Unguarded Gate: The Jurisdictional Gap Within FDA "Device" Regulation*, 5 J.L.

transmitted via a radio frequency signal when a proprietary scanner is passed over the device.¹⁰ VeriChip does not have GPS capability, so it cannot be used for locating a person. VeriChip simply stores information that can be read by the proprietary scanner. Information, such as name and address, is stored in the microchip and can be retrieved in case of emergency by anyone who has the scanning device. Although ADS does not provide the number of VeriChips it has sold, VeriChips are already being included on standardized requests for production forms, suggesting that the use of VeriChips is substantial enough to warrant attention.¹¹

The second relevant product, named “Digital Angel,” is a device worn like a (removable) watch which can communicate the location of the wearer to any designated person via GPS data transmitted through the wireless cell phone network and retrievable by the interested party on the Internet or by calling a designated number.¹² Digital Angel is marketed as a safety device for keeping track of elderly people and “families on the go.”¹³ Because Digital Angel is worn on the wrist and can be taken off at any time, it does not have the permanency that VeriChip offers.

The presence of the VeriChip and Digital Angel products on the market, along with the announcement of a working GPS implant prototype demonstrate that it is only a matter of months before PLDs are available commercially.¹⁴ A GPS implant offered by ADS would likely be affordable and require only a brief outpatient procedure to insert, given that the VeriChip costs about \$200 and the device is inserted with a large needle by a doctor.¹⁵ A GPS implant could be marketed to the same demographic as Digital Angel—it could be marketed as a tool to keep track of elderly family members or children. However, given the rapid expansion of GPS technology from the military to the average consumer,

& FAM. STUD. 189, 198-99 (2003) (Although this article is outdated as it does not include discussion of the FDA’s October 2002 decision, the author does discuss loopholes of medical device regulation as it would apply to VeriChip and mentions some of the potential safety risks of the product.).

10. Press Release, Applied Digital Solutions, *Applied Digital Solutions Announces Working Prototype of Subdermal GPS Personal Location Device* (May 13, 2003), at <http://www.adsx.com/news/2003/051303.html>.

11. DAVID E. KELTNER, TEXAS PRACTICE GUIDE, § 8:114 (2003) (defining “documents” to include “intra- or extra- body technological devices (including but not limited to ‘Verichips’ and like devices)”).

12. Digital Angel Corp., *Digital Angel/Consumer* at <http://www.digitalangelcorp.com/consumer.asp> (on file with the Indiana Law Review). A similar watch-like device is available from another company named “Wherify.” See http://www.wherifywireless.com/corp_home.htm (last visited Nov. 15, 2004).

13. *Id.*

14. For more information on VeriChip or Digital Angel products, see the following websites: <http://www.4verichip.com> and <http://www.digitalangelcorp.com> (last visited Nov. 15, 2004).

15. Christopher Newton, *U.S. to Weigh Computer Chip Implant*, AP ONLINE, Feb. 27, 2002, available at 2002 WL 14995023.

it may be only a matter of time before GPS implants are commonplace in individuals from all parts of society—not just those that are at risk for getting lost or kidnapped.¹⁶ One could conceive a world where a parent who wishes to keep track of where his teenager goes on the weekend or where a spouse, wishing to time dinner perfectly, logs onto his computer to determine how close to home his wife is.

II. PRIVACY CONCERNS OF GPS IMPLANT HOSTS—BIG BUSINESS AS BIG BROTHER

A. *Background on Commercial Intrusion into Private Life*

In the twenty-first century the enemy in the privacy war may no longer be the government, but instead may be Corporate America. The academic literature is rich with analysis of the privacy rights that citizens hold and the limits that these rights place on government intrusion into private life.¹⁷

Of more recent origin is the intrusion of commercial interests into private life. The market value of location information will tempt GPS implant providers to sell their customers' location information even if, initially, this is not the primary purpose for the device. The national and state do-not-call lists are examples of how important privacy is to the general public.¹⁸ If sales calls during

16. For more potential applications of VeriChip and GPS implants, see Dean Unatin, *Progress v. Privacy: The Debate Over Computer Chip Implants*, 2002 UCLA J.L. & TECH. NOTES 24 (2002) (describing uses for soldiers and criminals as well as children and Alzheimer's patients).

17. This Note will not discuss an individual's right to privacy under the U.S. Constitution or state constitutions. Such constitutional privacy rights may be implicated when law enforcement officials search or require information as part of an investigation, but that is not the same privacy interest as the one at stake when companies release personal information for marketing purposes. See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234 n.6 (10th Cir. 1999) (explaining that the privacy interest in a case dealing with telecommunication providers' use of customers' personal call information—including location - for outside marketing was not the same as constitutional right to privacy as addressed in *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) or *Roe v. Wade*, 410 U.S. 113, 152-56 (1973)). For a recent decision about GPS transmitters used to track a criminal suspect, see *State v. Jackson*, 46 P.3d 257, 269 (Wash. Ct. App. 2002) (comparing the use of a GPS tracking device on a car that was lawfully searched to the use of binoculars: "[m]onitoring Mr. Jackson's public travels in his truck by use of the GPS device is reasonably viewed as merely sense augmenting, revealing open-view information of what might easily be seen from a lawful vantage point without such aids."). For a recent discussion of privacy from governmental intrusion for wearers of external personal location devices, such as wrist-watch models, see Waseem Karim, *The Privacy Implications of Personal Locators: Why You Should Think Twice Before Voluntarily Availing Yourself to GPS Monitoring*, 14 WASH. U.J.L. & POL'Y 485, 501-09 (2004).

18. For information on the National Do-Not-Call Registry, see <http://www.fcc.gov/cgb/donotcall/> (last visited Nov. 15, 2004). Many states have their own do-not-call lists. See, for example, Indiana's web page [http://www.in.gov/attorney general/telephone/FAQs.htm](http://www.in.gov/attorney%20general/telephone/FAQs.htm)s (last visited Nov. 15, 2004).

the dinner hour are considered intrusive, how would the average American feel if their comings and goings were constantly monitored and sold to marketing groups to better target advertising? GPS implants may be marketed primarily as safety devices, but perhaps, as is the case with supermarket shopping cards, there is a marketing opportunity lying just beneath the surface.¹⁹

Privacy of a person's location information, as gathered through GPS technology, is a topic of wide-spread importance—as evidenced by the use of the topic in a recent national moot court competition.²⁰ The case for the John Marshall National Moot Court Competition in Information Technology and Privacy Law for 2002 concerned a student who rented a moving truck that was equipped with GPS tracking technology. The truck company used the GPS tracking to determine where the truck had traveled and the company charged the student extra fees because he had taken the truck outside the state. Additionally, the truck company called one of the student's references to report that the student might be in trouble or involved in trouble based on the fact that the truck was parked overnight in the parking lot of an adult bookstore. As a result of this call, the student lost his scholarship. The student sued based on, among other things, the privacy tort of intrusion upon seclusion and deceptive business practices.²¹

B. Comparison of Privacy Concerns of GPS Implant Hosts to Privacy Concerns Surrounding Enhanced 911

Perhaps the most direct comparison of privacy concerns regarding the use of a GPS implant can be drawn from the privacy concerns associated with Enhanced 911 service for wireless phones. The Federal Communications Commission (FCC) requires wireless telecommunications providers to equip their phones and

19. See Katherine Albrecht, *Supermarket Cards: The Tip of the Retail Surveillance Iceberg*, 79 DENV. U.L. REV. 534 (2002). Albrecht discusses shopper cards which supermarkets use ostensibly for savings opportunities for customers, but actually the

cards allow retailers to amass unprecedented amounts of longitudinal information on consumer purchase and eating habits. Each time a shopper scans a card at the checkout lane, a record of the items purchased, the time, the store location, and the payment method are added to the shopper's profile. Along with millions of other records, this profile is stored in an enormous 'data warehouse' (frequently a secure facility run by a marketing company under contract to several different supermarkets) where it can be analyzed in detail or simply stored until a later use is found for it.

Id. at 534.

20. Charles Lee Mudd, Jr. et al., *Moot Court Competition Bench Memorandum*, 21 J. MARSHALL J. COMPUTER & INFO. L. 37, 41 (2002).

21. *Id.* at 41-43, 46, 53. See also South Texas College of Law, *Brief for the Petitioner*, 21 J. MARSHALL J. COMPUTER & INFO. L. 59 (2002); Texas Tech University School of Law, *Brief for the Respondent*, 21 J. MARSHALL J. COMPUTER & INFO. L. 99 (2002); Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, CHI. BAR ASSOC. REC. Oct. 15, 2001, at 28, 30-33 (2001) (discussing applicability of privacy torts to a rental agency's use of GPS tracking device in a rental car).

wireless networks with the technology to locate and transmit the location of a cell phone user to a public safety answering point (PSAP—commonly known as the dispatch center) whenever the caller dials 911. One possible way of complying with this requirement is to use a GPS equipped handset, although cellular network-based solutions are also permitted.²² The location accuracy requirements and time tables for implementation have been subject to change, but, since October 1, 2001, carriers have been required to have an accuracy of “50 meters for 67 percent of calls” in the case of handset-based solutions.²³ Many wireless carriers have not complied with the deadlines and some have paid fines for their noncompliance.²⁴

The reason that wireless companies are failing to comply with FCC regulations is that the cost of upgrading their systems and developing the technology required to transmit accurate location information from a cell phone is substantial: “[m]any carriers have already spent hundreds of millions of dollars to deploy location-tracking technologies. To recoup expenses, wireless carriers are exploring ways to generate new revenue from their investments in these capabilities.”²⁵ Traupman notes:

The same technology that alerts paramedics and police to safety emergencies, for example, can also help automobile drivers locate the nearest French restaurant or gas station. Additionally merchants will be equipped to call a frequent shopper’s mobile phone and offer a time-sensitive coupon when the shopper is near the merchant’s store.²⁶

These uses seem relatively harmless, even if they might be deemed annoying. However there are additional potential uses that would have privacy advocates even more concerned:

As explained by James Dempsey of the Center for Democracy and Technology, “what if your insurer finds out you’re into rock climbing or late-night carousing in the red-light district? What if your employer knows you’re being treated for AIDS at a local clinic? The potential is there for inferences to be drawn about you based on knowledge of your whereabouts.” In short, privacy advocates are concerned that cell-phone companies will release location information to third parties—whether the third party is a marketer, a law enforcement agency, an employer, or

22. Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling System, 14 F.C.C.R. 17388, 17393 (1999).

23. *Id.* at 17392-93.

24. *See* Cingular Wireless LLC, 17 F.C.C.R. 8529, 8533 (2002) (proposing revised compliance dates and mandating contributions to the U.S. Treasury of up to \$1.2 million for each missed deadline); AT&T Wireless Services, Inc., 17 F.C.C.R. 19938, 19938 (2002) (adopting consent decree terminating violation proceeding).

25. Ellen Traupman, *Who Knows Where You Are? Privacy and Wireless Services*, 10 COMM. L. CONSPICUOUS 133, 135-36 (2001) (footnotes omitted).

26. *Id.* at 136 (footnotes omitted).

a criminal.²⁷

Perhaps foreshadowing these privacy concerns, Congress passed the Wireless Communications and Public Safety Act of 1999,²⁸ which requires customer approval in order for wireless providers to use or disclose location information.²⁹ However, as will be discussed below, the customer approval process has been the subject of much debate and often leaves privacy advocates unsatisfied.³⁰

One might, at first, draw a distinction between GPS equipped cell phones and GPS implants, thinking that there is no privacy issue involved with GPS implants for humans. After all, the product is being advertised for emergency uses such as locating kidnapped children or wandering Alzheimer's patients. However, the same argument could have been made for GPS technology in cell phones. Originally, GPS technology in cell phones was mandated by the FCC for use in emergency situations. But the cell phone companies and businesses realized the value of this location information for market use—and the same is likely to occur for GPS implants. As Traupman noted in her article, “[i]nformation like this is simply too good—not to mention expensive—to leave for emergencies and police work.”³¹ Marketing companies would love to know what time of day a customer drives by a certain coffee shop or which customers drive by an athletic store on their way to the gym. A business might want to know the location of its competition's sales personnel and the routes taken for sales calls. Certain individuals might want to purchase location information for blackmail, extortion, child custody disputes, or divorce litigation.

The chance that GPS implant providers would sell the location information of their customers to other businesses is extremely high, especially considering Digital Angel's privacy policy (Digital Angel is the wrist-watch version of the GPS personal location device). The privacy policy, as available on Digital Angel's web site, states that “[w]e may, from time to time, share, sell or rent some of your personal information with third parties with whom we have a

27. Aaron Renenger, Note, *Satellite Tracking and the Right to Privacy*, 53 HASTINGS L.J. 549, 553 (2002) (quoting Simon Romero, *Location Devices' Use Rises, Prompting Privacy Concerns*, N.Y. TIMES, March 4, 2001 at 25).

28. Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, § 5, 113 Stat. 1288-1289 (1999).

29. See 47 U.S.C. § 222(f) (2000).

30. For further discussion of the inadequacy of current protection for location information privacy, especially in the wake of the terrorist attacks of 9/11, see Aaron Futch & Christine Soares, *Enhanced 911 Technology and Privacy Concerns: How Has the Balance Changed Since September 11?*, 2001 DUKE L. & TECH. REV. 38, 23 (2001) (“Given the speed with which events are now unfolding both at home and abroad, a well reasoned, carefully considered approach to protecting privacy in the E911 system is likely to be an unfortunate casualty.”); David J. Phillips, *Beyond Privacy: Confronting Locational Surveillance in Wireless Communication*, 8 COMM. L. & POL’Y 1, 7 (2003) (discussing the PATRIOT Act).

31. See Traupman, *supra* note 25, at 136 n.35 (quoting Alan Charles Raul, *O Customer, Where Art Thou?*, eCOMPANY NOW, Mar. 1, 2001 (no longer available at cited website)).

business relationship so long as they agree not to share, sell or rent any of your personal information with others.”³² This policy may only apply to the information required to place an order with the company (such as name, address, phone number, and e-mail), but it may also apply to the location information gathered when the consumer uses the product. The privacy policy was not explicit—which is yet another reason to be wary.

Additionally, the fact that GPS implants have yet to make an entrance on the market does not preclude the consumer privacy issue from being discussed. On the contrary, if this new technology is to be given a chance, privacy issues would best be dealt with before the GPS implant is available. Consumers must have confidence in a new technology before they will use it, and there will be no confidence if the public fears that its location information will be up for sale. At least one writer has acknowledged this necessity in the case of GPS in cell phones: “For this technology to take off, (consumers) must have a uniform expectation about their privacy, that it is the customer and not the service provider who has control over the use of their location information.”³³ Speaking more generally of GPS technology, one commentator notes that the “truly beneficial uses of location technologies such as safety and search and rescue could develop into strong markets for the GPS community only if the Big Brother issues can be addressed.”³⁴ A lack of privacy protection for consumers of new GPS products, such as the human implant, could have a disastrous effect on the predicted exponential growth of the GPS market.³⁵

Besides privacy concerns, there are more serious concerns that might arise with the introduction of GPS implants to the marketplace, such as danger to the GPS implant host and liability of the GPS implant provider for bad data or breach of security. Although these issues are beyond the scope of this Note, they are worthy of brief discussion here. GPS implant providers could be held liable for injuries sustained by hosts if the product failed to emit a signal for emergency personnel to locate the host or if the data gave the wrong location.³⁶ If the Digital Angel product is any model for the forthcoming GPS human implant product, location information would be available for customers on Internet sites as part of the standard service. Even if this information were password protected, web sites

32. Digital Angel Corp., *Digital Angel Privacy Policy* at http://www.digitalangelcorp.com/about_privacy.asp (on file with the Indiana Law Review). As of March 4, 2004, the Privacy Policy contained this language, but it has since been omitted.

33. M.J. Zuckerman, *Wireless, with Strings Attached: A Cellphone Can Make You Stand Out, to Rescuers and Marketers Alike*, USA TODAY, Feb. 7, 2001, at 1D (quoting Michael Altschul, general counsel to the Cellular Telecommunications & Internet Association, an industry trade group, on the subject of location based services utilizing location information from cell phones).

34. Dee Ann Divis, *Saving Private Location*, GPS WORLD, Oct. 1, 2003.

35. The market for location based services is predicted to grow from revenues of \$6 million today to revenues of \$828 million in 2005. *Id.*

36. See, e.g., Jennifer L. Phillips, Comment, *Information Liability: The Possible Chilling Effect of Tort Claims Against Producers of Geographic Information Systems Data*, 26 FLA. ST. U.L. REV. 743 (1999).

can be hacked and “[m]isuse of an implanted tracking device embedded in a child’s shoulder and tracked by Internet access is foreseeable at the least by the criminal element of society who habitually adjusts to new technological demands.”³⁷ Worse yet, the presence of a GPS implant in a child could put the child at further risk of harm even though the implant is billed as a safety device:

In the case of the imbedded tracking device, when a child is abducted, the criminal is highly motivated to act out in self interest even at the child’s expense. If the criminal knew the child had the device implanted in a standard location of the shoulder and it was emitting continuous information concerning the abductor’s location, it is not difficult to imagine, and even foreseeable that an abductor would cut the device out of the child’s shoulder.³⁸

These concerns are certainly important, however, analysis of these issues would require a discussion beyond the scope of this Note.

III. APPLICABILITY (OR LACK THEREOF) OF EXISTING PRIVACY TORTS AND LEGISLATION TO GPS IMPLANTS

A. *Privacy Torts*

One potential avenue for protection of consumer privacy is through tort claims against GPS implant providers. All modern day privacy torts find their birth in Warren and Brandeis’ influential nineteenth century article where the authors noted that

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.³⁹

Although Warren and Brandeis’ article was principally aimed at the press and the “invention” they referred to was the photograph, which could then be taken instantly rather than requiring one to consciously sit for the photograph, their words could be applied to businesses and modern day technologies like GPS.

Warren and Brandeis’ theories did not go unnoticed and have given rise to four generally recognized privacy torts today: intrusion upon seclusion, false

37. Cochran, *supra* note 9, at 198-200 (discussing potential lack of Food & Drug Administration (FDA) oversight in the use of VeriChip).

38. *Id.* at 199 (discussing ADS’s GPS implant in the context of where it would fit into FDA regulation).

39. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

light, misappropriation of publicity, and publicity of a person's private life.⁴⁰ If these torts were applied to the use of GPS location information, the success of the privacy tort claim would be unlikely. However, the tort claims discussed below could be brought against the GPS implant provider. Claims brought against an eavesdropper who obtained information location by intercepting the GPS signal would be covered under the Electronic Communications Privacy Act, which will be discussed below.⁴¹

The false light and misappropriation torts would not provide consumer privacy protection because they are not applicable to GPS information. The false light tort would not be applicable because "[t]he potential privacy invasion concerning the use of GPS . . . is not based on falsity, but on dissemination of truthful information that a consumer would prefer to keep private."⁴² Likewise, the misappropriation tort is not applicable to the use of GPS information because this use does not involve "a person's name or image, but knowledge of that person's precise whereabouts."⁴³

Public disclosure of private facts may at first seem to apply to disclosure of GPS location information, but the tort is limited because "if an event takes place in a public place, the tort is unavailable."⁴⁴ Courts generally find that when a person travels over public streets, he voluntarily conveys his location information.⁴⁵ However, there are some limitations to the public place exception. For example, even though women could be observed entering and leaving a public Women's Clinic, this was held not a defense to the tort of public disclosure of embarrassing personal facts where abortion protesters had placed the names of the women on protest signs, implying that they were about to undergo an abortion.⁴⁶ The court reasoned that "merely because plaintiffs' 'comings and goings' may have been visible to members of the public does not mean that the public was aware of the precise purpose of those 'comings and goings.'"⁴⁷ Following that reasoning, if a GPS implant provider were to sell or

40. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652E (1977).

41. See discussion *infra* Part III.C.

42. Renenger, *supra* note 27, at 556.

43. *Id.*

44. *Id.* at 557 (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. b. (1977)).

45. *United States v. Knotts*, 460 U.S. 276, 281-82 (1982) (finding suspect had no reasonable expectation of privacy while driving on public roads, so use of tracking device was not a violation of the Fourth Amendment).

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the defendant] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id.

46. *Doe v. Mills*, 536 N.W.2d 824, 832 (Mich. App. 1995).

47. *Id.*; see also *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1969) ("A person

disclose customer location information (without the customer's consent), and that information was publicly displayed, then conceivably the provider could be held liable for the wrongful disclosure of these private facts. A GPS situation analogous to the abortion case might be a GPS implant customer whose trips to an AIDS clinic or male strip club were disclosed to a conservative group that listed the customer's name as a homosexual on protest signs.

Finally, the intrusion upon seclusion tort, which is often applied in cases of eavesdropping, might be applicable to the GPS information situation; however the gathering of such information in a public space provides an exception to the tort just as it does for public disclosure of private facts.⁴⁸ Yet, the 2002 John Marshall National Moot Court Competition in Information Technology and Privacy Law felt the intrusion upon seclusion tort in the GPS context had enough merit to include the issue in its moot court case.⁴⁹

Torts are one possible way of protecting the privacy of GPS implant hosts. However, there are other more proactive rather than reactive measures that can be taken such as legislation preventing the disclosure of location information by companies providing location services to consumers.

B. Telecommunications Act of 1996 and Wireless Communications and Public Safety Act of 1999

Although regulation of GPS implants may not fall under the Telecommunications Act of 1996 (hereinafter Telecom Act),⁵⁰ it is still useful to undertake a detailed analysis of how the Telecom Act protects consumer privacy because it may serve as a model for legislation tailored specifically for GPS implants. The Telecom Act appears to be the only legislation that addresses consumer privacy concerning an individual's location information and therefore deserves in depth attention. The purpose of the Telecom Act was to update the Communications Act of 1934 so that it could handle new technologies such as the Internet, cable, cellular phones, and other types of communication available in the digital age.⁵¹ Although Congress' "central ambition" may have been to "permit more competition into telecommunications markets," the Telecom Act also contained privacy legislation aimed at protecting consumers.⁵²

1. Protection for Consumers.—The Telecom Act protects consumers from unauthorized release of their personal information. It restricts the use of consumer information by telecommunications carriers:

does not automatically make public everything he does merely by being in a public place. . . .").

48. Renenger, *supra* note 27, at 558.

49. Mudd et al., *supra* note 20, at 41.

50. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§151-710 (2000)).

51. See Michael I. Myerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1997).

52. Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 304 (1996).

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.⁵³

The Telecom Act protects “customer proprietary network information,” which is defined as “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications services subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship.”⁵⁴

The Telecom Act did not originally include location information, but was amended to explicitly include “location” in the definition of customer proprietary network information (CPNI) by the Wireless Communications and Public Safety Act of 1999.⁵⁵ This 1999 Act also added subsection (f) to section 222, which is focused on location information exclusively and states:

For purposes of subsection (c)(1) of this section, without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to—(1) call location information concerning the user of a commercial mobile service . . . other than in accordance with subsection (d)(4) of this section⁵⁶

Notice that this part refers to “express prior authorization” rather than “approval of the customer” in the CPNI section. As will be discussed below, these seemingly similar approval requirements are in fact vastly different.

2. *FCC’s First Attempt at Providing Guidance for Telecommunications Providers.*—The Telecom Act did not explain the manner in which telecommunication providers were to obtain consent from customers to use their CPNI and location information. In response to telecommunication providers’ requests, the FCC issued an order in February 1998 (“1998 CPNI Order”) under which the FCC adopted an “opt-in” approach, requiring providers to obtain customer permission before releasing their CPNI to companies for purposes

53. 47 U.S.C. § 222(c)(1) (2000). The privacy of consumer information is discussed in 47 U.S.C. § 222. Telecomm. Act of 1996 § 702, 47 U.S.C. § 222.

54. *Id.* § 222(h)(1)(A).

55. Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, § 5, 113 Stat. 1288-1289 (1999).

56. 47 U.S.C. § 222(f). Subsection (d)(4) creates an exception for the release of customer location information in the case of an emergency and limits this release to emergency personnel and family members. *Id.* § 222(d)(4).

outside the customer's existing relationship with the provider.⁵⁷ "Opt-in" consent means that "one's prior, express approval must be obtained before personal information is used for purposes beyond those associated with the initial collection purpose."⁵⁸ In contrast, an "opt-out" system "allows approval to be inferred from the customer-data processor relationship unless an individual specifically requests limits on further use."⁵⁹

3. *Telecommunications Backlash: The U.S. West Case.*—The telecommunications provider, U.S. West, was not satisfied with the FCC's selection of the opt-in approach "rather than its suggested opt-out approach (which is allegedly cheaper and results in a higher 'approval' rate than the opt-in approach)."⁶⁰ So, the company filed suit against the FCC alleging that the opt-in standard adopted in the 1998 CPNI Order was an arbitrary and capricious interpretation of 47 U.S.C. § 222 and violated the First and Fifth Amendments of the Constitution.⁶¹ The court reached only the First Amendment claim and found that the FCC's opt-in regulation violated the First Amendment under the *Central Hudson* analysis for commercial speech.⁶²

The court described the *Central Hudson* test as first presenting a threshold question of "whether the commercial speech concerns lawful activity and is not misleading."⁶³ No one disputed that the commercial speech based on CPNI was lawful and non-misleading, so the court addressed only the remaining prongs of the *Central Hudson* test whereby "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances the interest, and (3) the regulation is no more extensive than necessary to serve the interest.'"⁶⁴

57. Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 13 F.C.C.R. 8061, 8066-67 (1998) [hereinafter 1998 CPNI Order].

58. Paul M. Schwartz, *Charting a Privacy Research Agenda: Responses, Agreements, and Reflections*, 32 CONN. L. REV. 929, 934 (2000).

59. *Id.*

60. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999) (Briscoe, J., dissenting), *cert. denied*, 530 U.S. 1213 (2000).

61. *Id.* at 1228 (majority).

62. *Id.* at 1240. It is important to note that the court did not find § 222 itself to be unconstitutional—that claim was not alleged by U.S. West.

63. *Id.* at 1233 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

64. *Id.* at 1233 (quoting *Revo v. Disciplinary Bd. of the Sup. Ct. for the State of N.M.*, 106 F.3d 929, 932 (10th Cir. 1997) (citing *Central Hudson*, 447 U.S. at 564-65)). Another Supreme Court case holds that the third prong of the *Central Hudson* test is not entirely accurate. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478, 480 (1989) (holding the "no more extensive than reasonably necessary" test to be incompatible with the subordinate position of commercial speech in the free speech hierarchy and designating a "means narrowly tailored to achieve the desired objective" test). The *Fox* test is more lenient to government regulation of commercial speech than the *Central Hudson* test, and the *U.S. West* court did take this new test into consideration when it discussed the third prong in depth. *U.S. West*, 182 F.3d at 1238.

The court expressed doubt whether there was a substantial state interest in regulating the use of CPNI: “[a]lthough we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely.”⁶⁵ The court required “a more empirical explanation and justification” than simply the concern that disclosure of CPNI could prove embarrassing.⁶⁶ Assuming for the sake of appeal that the government had met the substantial state interest requirement, the court found that the government failed to show that the regulation materially advanced the interest because it presented “no evidence showing the harm to either privacy or competition is real.”⁶⁷ The court reasoned that there was no indication that disclosure of CPNI might actually occur, while acknowledging that “protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract.”⁶⁸

Lastly, the court found that FCC rules requiring opt-in approval were not narrowly tailored.⁶⁹ The court found that the FCC rejected an opt-out approval process on mere speculation that “there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.”⁷⁰ The court was careful to caution that it was not using a least restrictive means test, but “merely recognize[d] the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.”⁷¹ This obvious and substantially less restrictive means was the opt-out approval mechanism.⁷²

4. *Current Limitations on the Release of Location Information.*—In response to the *U.S. West* case, the FCC issued a further order stating what the approval standard should be for § 222.⁷³ In this document, the FCC adopted an opt-out standard for intra-company use of CPNI and for “sharing of CPNI with, and use by, a carrier’s joint venture partners and independent contractors in connection with communications-related services that are provided by the carrier (or its

65. *Id.* at 1235.

66. *Id.*

67. *Id.* at 1237.

68. *Id.* (Apparently, the court did not deem the fact that the telecommunication industry cared enough about the standard to go to court as evidence that the industry intended to disclose CPNI for marketing purposes to third parties.).

69. *Id.* at 1238 (citing *Fox*, 492 U.S. at 480; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

70. *Id.* at 1239.

71. *Id.* at 1238 n.11.

72. *Id.* at 1239.

73. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, 17 F.C.C.R. 14860 (2002) [hereinafter 2002 CPNI Order].

affiliates) individually, or together with the joint venture partner.”⁷⁴ However, in the case of disclosure to third parties and affiliates that provide no communications-related services, the FCC determined that an opt-in standard was appropriate even in light of the *U.S. West* case.⁷⁵ The FCC reasoned:

[C]onsumers say that their privacy interest is substantially greater when asked about releasing information to third parties or for uses beyond their expectations based on the existing relationship with their chosen carrier. Furthermore, once such information leaves the hands of the customer’s carrier, the customer loses her ability to limit further dissemination, and section 222 and the Commission’s rules concerning use of CPNI are not applicable to those unknown third parties that receive the customer’s personal information. For these reasons, there is a greater need to ensure express consent from an approval mechanism for third party disclosure. Opt-in directly and materially advances this interest by mandating that carriers provide prior notice to customers and refrain from disclosing CPNI unless a customer gives her express consent by written, oral, or electronic means.⁷⁶

In the 2002 CPNI Order, the FCC established the customer consent standards for CPNI, which in its statutory definition includes the word “location.”⁷⁷ However, wireless location information is also protected by § 222(f) and the standard for disclosure of or access to this information is “express prior authorization.”⁷⁸ Ellen Traupman argues that Congress’ choice of words in this section “means clear, unmistakable customer approval is required before using or disclosing location information relating to wireless subscribers,” thus requiring an opt-in standard.⁷⁹ However, Traupman wrote her article before the FCC released its 2002 CPNI Order.

Yet, the FCC noted that “section 222 adopts a different standard for use of wireless location information than for use of other kinds of CPNI. The standard for use of wireless location information will be addressed in a separately docketed proceeding.”⁸⁰ As promised, the FCC returned to this issue, however the FCC declined to commence a rulemaking on § 222(f), reasoning that “[b]ecause the statute imposes clear legal obligations and protections for consumers and because we do not wish to artificially constrain the still-developing market for location-based services, we determine that the better

74. *Id.* at 14875.

75. *Id.* at 14883.

76. *Id.* at 14885-86 (footnotes omitted).

77. 47 U.S.C. § 222(h)(1) (2000).

78. *Id.* § 222(f).

79. Traupman, *supra* note 25, at 144.

80. 2002 CPNI Order, *supra* note 73, at 14865 n.20 (referring to Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. March 16, 2001)).

course is to vigorously enforce the law as written, without further clarification of the statutory provision by rule.”⁸¹

Although the FCC has deemed § 222(f) self-explanatory, others have warned that telecommunication providers may decide for themselves whether the section could ever allow implied consent and what is included in the definition of location information.⁸² Should a telecommunications provider ignore the consent requirements or interpret them in a manner that the FCC deems inappropriate, the telecommunications provider would be subject to an enforcement action by the FCC, which could include fines in the million-dollar range.⁸³

In summary, the existing protection for customer location information under the Telecom Act varies depending upon what part of § 222 is used (either CPNI or 222(f) location information) and to whom the information is being given (joint venture and independent contractors or third parties). If the CPNI protection of § 222 is used, then the FCC applies an opt-out approach for use by the company and its partners in communications-related services. If the CPNI is passed to a third party, however, the FCC has ordered an opt-in approach. Likewise, disclosure of wireless location information under § 222(f) requires “express prior authorization,” although the FCC has declined to make explicit the meaning of this phrase for fear of discouraging further development of location based-services.⁸⁴

5. *Whether ADS or Other GPS Implant Providers Would Be Covered by the Telecom Act.*—Now that the reader has a basic understanding of the Telecom Act and its implications for consumer privacy of location information, the question remains whether the Telecom Act is applicable to GPS implant providers. Traupman argues that “non-carrier application providers and content developers” who use location information gathered by the telecommunications providers are not governed by the § 222 CPNI restrictions.⁸⁵ Additionally, Reneger argues that the Telecom Act “offers no protection for people whose privacy is violated through non-cell-phone-based collections of location information” and cites the

81. *In re Request by Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices*, 17 F.C.C.R. 14832, 14832 (2002) [hereinafter *Request for Location Information Practices*].

82. “For example, some carriers have asserted that the location of the cell tower nearest a customer is not ‘location information.’” Phillips, *supra* note 30, at 14 (citing *Request for Location Information Practices*, *supra* note 81, at 14839) (statement of Commissioner Michael J. Copps, dissenting)).

83. “[T]he holder of CPNI, the customer’s existing telecommunications provider (including its telecommunications affiliates), is subject to enforcement action by the Commission for any failure to abide by the notice rules regarding planned use, disclosure, or permission to access a customer’s CPNI.” 2002 CPNI Order, *supra* note 73, at 14878 (footnotes omitted); *see, e.g.*, *Cingular Wireless LLC*, 17 F.C.C.R. 8529, 8533 (2002) (mandating “contributions” to the U.S. Treasury of up to \$1.2 million for each missed deadline).

84. *See supra* text accompanying note 81.

85. Traupman, *supra* note 25, at 146.

use of GPS in rental cars to track customer speeding as an example.⁸⁶

In order to determine whether the Telecom Act could apply to GPS implant providers, we must look to the definitions of certain terms used in the Act. A recent case provides guidance for applying the Telecom Act to new technology.⁸⁷ In *AT&T v. City of Portland*, the court considered whether the Telecom Act applied to cable broadband internet access and stated that ““we look first to the plain language of the statute, construing the provision of the entire law, including its object and policy.””⁸⁸ This case is particularly helpful as a statutory interpretation standard since the FCC has not offered a construction, in the form of a substantive or interpretive rulemaking, of the Telecom Act relating to GPS implant providers.

Many cases emphasize judicial deference to an administrative agency’s (like the FCC’s) statutory construction, however in *AT&T*, the court disagreed with the FCC’s interpretation and instead performed its own interpretation of the Telecom Act.⁸⁹ Since the FCC’s interpretation was not arrived at through rulemaking, but instead was developed for the purposes of the litigation, the court did not feel bound to defer to the agency’s litigating position.⁹⁰ Thus, this case provides insights into the process that a court might undertake if a GPS implant provider case were to arise under the Telecom Act in the current situation with an absence of an official FCC ruling on GPS implants.

The contested issue in *AT&T* was whether the local cable franchising authority could “condition a transfer of a cable franchise upon the cable operator’s [AT&T’s] grant of unrestricted access to its cable broadband transmission facilities for Internet service providers other than the operator’s proprietary service [“@Home”].”⁹¹ This issue turned on two determinations: 1) whether @Home was a “cable service” as defined in the Communications Act (the act which the Telecom Act supplements) and 2) whether @Home, as operated by AT&T, was merely an “information service” or also a telecommunications service.⁹²

When examining the cable service issue, the court looked both at the definition in the statute and the practicality of treating @Home as a cable service. The court reasoned that the @Home internet service provider was not a cable

86. Renenger, *supra* note 27, at 562.

87. *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *See also* *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003) (upholding AT&T decision even in light of contrary ruling by the FCC); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802 (2002) (finding “cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and there is no separate offering of telecommunications service”).

88. *AT&T Corp.*, 216 F.3d at 876 (quoting *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)).

89. *Id.* at 876.

90. *Id.*

91. *Id.* at 873.

92. *Id.* at 876-77.

service under the statutory definition because “Internet access is not one-way and general, but interactive and individual beyond the ‘subscriber interaction’ contemplated by the statute.”⁹³ Additionally, the court reasoned that “applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure,” for example requiring @Home to carry the signals of local commercial and non-commercial educational television stations.⁹⁴

For the second issue, the FCC argued that a cable broadband internet service provider (ISP) was merely an information service, defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁹⁵ The FCC maintained:

ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the “public” in terms of the statutory definition of telecommunications service, they provide “information services,” and therefore are not subject to regulation as telecommunications carriers.⁹⁶

However, the court found that the telephone service linking the user and the ISP was a telecommunications service as defined under the Act because it “control[led] all of the transmission facilities between its subscribers and the Internet.”⁹⁷ So this particular ISP had both elements of an information service and a telecommunications service by virtue of its ownership by AT&T. Therefore, the court concluded that AT&T did not need to obtain a franchise to offer cable broadband through its ISP because the service was a telecommunications service and not a cable service.⁹⁸

There are three possible scenarios under which GPS implant providers could be covered by the Telecom Act. A GPS implant provider could come within the scope of the Telecom Act if it was defined as a telecommunications carrier, a commercial mobile service, or a joint venture partner. Yet, as will be shown below, even if these scenarios existed, other considerations would make it more likely that the FCC would either fail to enforce the privacy rules or a reviewing court would not interpret the Telecom Act as pertaining to GPS implant providers.

a. ADS as a telecommunications carrier.—First, ADS (as a prototypical GPS implant provider) could be considered a telecommunications carrier for purposes of the CPNI privacy protection under 47 U.S.C. § 222(c). Section 153 of the Telecom Act defines “telecommunications” as “the transmission, between

93. *Id.* at 876.

94. *Id.* at 877.

95. *Id.* (quoting 47 U.S.C. § 153(20) (1996)).

96. *Id.*

97. *Id.* at 878.

98. *Id.* at 878-79.

or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁹⁹ A telecommunications carrier is simply a provider of telecommunication services and those services are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁰⁰

Under this broad definition of "telecommunications," GPS data might qualify as "information of the user's choosing," unchanged in form or content. The GPS data is transmitted from the implant to the provider's data warehouse via the wireless network, which would qualify as "between or among points specified by the user." Once the telecommunications definition is satisfied, GPS implant providers could satisfy the definition of "telecommunications carrier"—one who provides telecommunications services for a fee to the public.

However, regulating GPS implant providers was not the purpose that Congress had in mind when it enacted these statutes in 1996.¹⁰¹ Additionally, when compared to the ISP in the *AT&T* case, ADS would not have control over the transmission facilities between its implant hosts and the GPS satellite or computer database storing the location information. The *AT&T* court's determination of the ISP as a telecommunications service is distinguishable from the GPS implant scenario because ADS is not owned or operated by the telephone company that is providing the transmission facilities. Furthermore, in *AT&T*, the FCC argued that the ISP was not a telecommunications service, and if the FCC were asked to determine the applicability of the Telecom Act to GPS implant providers, it would likely refrain from extending the Telecom Act to GPS technology which is even more distant from a traditional telephone company.¹⁰² Finally, even if GPS implant providers were considered telecommunications providers and thus subject to the privacy restraints of § 222(c), this protection for CPNI does not carry the more protective "express prior authorization" standard that is applied to wireless location information.¹⁰³

b. ADS as a commercial mobile service.—Second, GPS implant providers could be considered "commercial mobile services" and thus subject to the location information privacy protection under 47 U.S.C. § 222(f). "Commercial mobile service," as used in § 222(f), is defined as, "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the

99. 47 U.S.C. § 153(43) (2000).

100. *Id.* § 153(44), (46).

101. *See supra* text accompanying notes 51-52. Although this point is not decisive by itself, a court would consider Congress' intent in the passing of the Telecom Act when determining whether to extend protection to a new technology.

102. The argument would have more force if a GPS implant provider first asked the FCC for an interpretation of the applicability of the Telecom Act to its service, rather than waiting until the point when litigation was inevitable.

103. *See supra* Part III.B.4.

Commission.”¹⁰⁴ “Interconnected service” is defined as “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending.”¹⁰⁵ Furthermore, the term “mobile service” is defined as:

[A] radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation¹⁰⁶

Concentrating on the first part of this definition, in order for GPS implant providers to be considered commercial mobile services, they must provide a radio communication service, that could be one-way only, and that is carried on between mobile stations and land stations. Although ADS has not released the mechanics of how its subdermal GPS personal location device would transmit the host’s coordinates to the company’s monitoring station, it is safe to assume that it would behave in a similar manner to ADS’s existing Digital Angel product. The Digital Angel product’s “[a]lert transmissions are contingent on operation in areas providing network service and strong CDPC (Cellular Digital Packet Data) wireless network coverage. In areas with weak or no coverage, alerts cannot be sent from the wearer’s monitor. Digital Angel’s services require the network service provided by AT&T Wireless.”¹⁰⁷ So, the location information would be transmitted over the wireless network (cellular phones transmit using radio) between the mobile human host and the company’s monitoring station. Plus, the fact that the GPS implant may not receive information via the wireless network (since it relies on satellites to determine its GPS coordinates) does not matter since one-way communication is permitted.

Yet, application of the label “commercial mobile service” to GPS implant providers leads to the same limitation as the telecommunications provider—the fact that transmission facilities, in the form of cell towers and the associated technology, are operated by the cell phone companies themselves—in this case AT&T. Defining ADS as a “commercial mobile service” ignores the common sense meaning of the term in favor of a blind reading of the statutory definition. Furthermore, even if ADS was considered a commercial mobile service and therefore subject to the privacy limitations of § 222(f), the statute only protects the call location information (as monitored by AT&T—likely the nearest cell

104. 47 U.S.C. § 332(d)(1) (2000).

105. *Id.* § 332(d)(2).

106. *Id.* § 153(27). For a definition of personal communication service, see 47 C.F.R. § 24.5 (2003).

107. Digital Angel Corp., *Digital Angel/Consumer*, *supra* note 12.

tower location), but not necessarily the content of the message being sent from the implant to the data warehouse, which includes the exact GPS coordinates.

c. ADS as a joint venture partner.—Third, ADS could be considered a joint venture partner with its cellular network provider—AT&T Wireless.¹⁰⁸ The FCC gave examples of joint venture partners that provide “information services typically provided by telecommunications carriers, such as Internet access or voice mail services.”¹⁰⁹ If ADS used the same wireless internet technology in its GPS implants, then its use of customer location information might be constrained by the FCC’s guidelines.¹¹⁰

However the relationship between the joint venture (ADS) and the telecommunications provider (AT&T) is not of the same type described in the 2002 CPNI Order. ADS would not be using CPNI from the telecommunications provider to market its GPS implants. Instead, ADS would be using its own location information generated from the GPS implants and then in turn sharing or selling this location information to other companies that might be communications or safety related, or could be completely unrelated in terms of products or services. This sort of relationship was not anticipated by the FCC, meaning that the opt-out requirement and joint venture safeguards are not applicable to ADS or AT&T in that capacity.

6. Conclusion: The Telecom Act Would Not Apply to GPS Implant Providers.—As discussed above, the Telecom Act is unlikely to provide privacy constraints for GPS implant providers since the providers do not meet the definitions or the purposes of the Act. Although public opinion may cry out for some sort of privacy protection of location information when GPS implants arrive on the market, the FCC would be unlikely to extend the protection of the Telecom Act to the new technology and a reviewing court will be unable to find such protection in the Act, because the court’s task is not to consider what policy

108. *See id.* (directing the web page visitor to click on “Wireless Internet” on the AT&T Wireless web site to determine whether his or her area was covered by Cellular Digital Packet Data wireless network coverage required for Digital Angel to work).

109. 2002 CPNI Order, *supra* note 73, at 14881.

110. *See supra* Part III.B.4. For guidelines, see 2002 CPNI Order, *supra* note 73, at 14881-82:

We require that carriers that allow access to or disclose CPNI to independent contractors or joint venture partners under an opt-out regime assure that certain safeguards are in place to protect consumers’ CPNI from further dissemination or uses beyond those consented to by the consumer. In particular, we require carriers, at a minimum, to enter into confidentiality agreements with independent contractors or joint venture partners that: (1) allow the independent contractor or joint venture partner to use the CPNI only for the purpose of marketing the communications-related services for which that CPNI has been provided; (2) disallow the independent contractor or joint venture partner from using, allowing access to, or disclosing the CPNI to any other party, unless required to make such disclosure under force of law; (3) require that the independent contractor or joint venture partner have appropriate protections in place to ensure the ongoing confidentiality of consumers’ CPNI.

should be.¹¹¹ Furthermore, even if GPS implant providers were considered telecommunication providers, “the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest.”¹¹² The FCC might determine that GPS implant use (when the implants first reach the market) is so minor as to make any rulemaking or enforcement based on an extension of the Telecom Act not worthwhile. For the aforementioned reasons, privacy protection for consumers using GPS implants must be found somewhere other than the Telecom Act.

C. Legislation Aimed at Eavesdropping and Internet Web Sites

1. *Electronic Communications Privacy Act.*—In addition to the possibility that GPS implant providers might attempt to sell their customers’ location information to marketers and other businesses, there remains the concern that third parties might try to gain this information for themselves directly. For example, a person might intercept the radio signal that is broadcast from the GPS implant on its way through the wireless network and then be able to retrieve the location information from the transmission. An analogous concept would be an eavesdropper using a high-powered microphone to overhear someone’s conversation. This type of access to a GPS implant host’s location information would be a clear violation of the law, although it is unlikely that a GPS implant provider would engage in this type of activity against its customers’ wishes. However, GPS implant providers might still need to address this issue, e.g., by providing encryption of the signal broadcasting the GPS coordinates of the host in order to deter others from eavesdropping.

Under the Electronic Communications Privacy Act (ECPA), interception of electronic communications is punishable by fines and incarceration.¹¹³ The transmission of GPS coordinates by the GPS implant through the wireless network would likely fit into the definition of “electronic communications” set forth in the ECPA, because the implant would likely operate like the Digital Angel product, which uses radio to transfer the data from the GPS device to the nearest cell phone tower.¹¹⁴ “Electronic communication” is defined as:

[A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire,

111. See *AT&T Corp.*, 216 F.3d at 876:

The parties, and numerous amici, forcefully urge us to consider what our national policy should be concerning open access to the Internet. However, that is not our task, and in our quicksilver technological environment it doubtless would be an idle exercise Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law’s words.

112. *Id.* at 879. See also 47 U.S.C. §160(a) (2000).

113. 18 U.S.C. § 2511 (2000); see generally *id.* §§ 2510-2520.

114. See *supra* text accompanying note 107.

radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

- (A) any wire or oral communication;
- (B) any communication made through a tone-only paging device;
- (C) any communication from a tracking device (as defined in section 3117 of this title); or
- (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.¹¹⁵

There is an exception to the electronic communications definition above for “tracking device[s].” A “tracking device” is defined as “an electronic or mechanical device which permits the tracking of the movement of a person or object.”¹¹⁶ On its face, this definition appears to describe the function of a GPS implant. However, the definition of a tracking device appears in the part of Title 18 that discusses search and seizure limitations on law enforcement, so this exception may be limited to law enforcement use. In light of the tracking device exception, the interpretation of the ECPA is unclear, and as another commentator has suggested, perhaps Congress should clarify the application of the tracking device exception to “ensure that anyone who wrongfully obtained location information and abused personal privacy could not hide under the tracking device exception found in the ECPA.”¹¹⁷

2. *Children’s On-line Privacy Protection Act.*—Although this Note has not concentrated on protection available for personal information that is gathered on the internet, one law that applies to websites’ collection and disclosure of personal information warrants special attention because it is tailored to one of the targeted users of the GPS implant—children. The Children’s On-line Privacy Protection Act requires the FTC to promulgate regulations that “require the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child” to take a number of precautions.¹¹⁸ Among other things, the operator must give notice of the information it collects from children at the website and what its disclosure policy is, “obtain verifiable parental consent for the collection, use, or disclosure of personal information from children,” and “establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.”¹¹⁹ The definition of “personal information” includes the standard information such as name, address, phone number, and social security number, but it also includes “any other identifier that the [FTC] determines permits the physical or online contacting of a specific

115. 18 U.S.C. § 2510(12).

116. *Id.* § 3117(b).

117. Traupman, *supra* note 25, at 151.

118. 15 U.S.C. § 6502 (2000).

119. *Id.* § 6502(b)(1).

individual.”¹²⁰ Location information in the form of GPS coordinates could be considered identifying information that would permit the physical contact of that child.

GPS implant providers would likely slip through the requirements of the Children’s On-line Privacy Protection Act because they are not collecting location information from children on the internet. Rather, they would simply be displaying location information obtained through a device that the child’s parents had implanted. Additionally, if the parent asked for the child to have a GPS implant inserted, then the parent has given permission for the GPS implant provider to track that child and store this information, at least for the parent’s access.

Although the Children’s Online Privacy Protection Act may not apply to GPS implant providers, the Act is still useful to keep in mind as a model for legislation that might be developed to protect the location privacy of GPS implant users. Additionally, there could be varying levels of privacy protection for GPS implant users—perhaps more protection for children using the GPS implant than for adults. The Children’s Online Privacy Protection Act is such an example of differential privacy protection.

IV. SUGGESTIONS FOR NEW LEGISLATION

Since the Telecom Act and other legislation discussed above either does not apply to GPS implants or provides inadequate protection, it is clear that new legislation is needed to protect hosts of the implants from intrusive commercial use of their location information. Legislation to protect the disclosure of location information from GPS human implants is perhaps more vital than the legislation that has already been enacted in the Telecom Act for GPS in cell phones. After all, location information for cell phones was an afterthought brought about because of the increase in 911 calls originating from cell phones, whereas location information is the primary purpose of GPS implants.

A. Pending Legislation

There are several bills pending in Congress that relate to the privacy of personal and location information that warrant discussion. House Bill 1636 is termed the “Consumer Privacy Protection Act of 2003,” and it proposes to regulate data collection organizations with a requirement that

A data collection organization shall provide to the consumer, without charge, the opportunity to preclude any sale or disclosure for consideration of the consumer’s personally identifiable information, provided in a particular data collection, that may be used for a purpose other than a transaction with the consumer, to any data collection organization that is not an information-sharing affiliate of the data

120. *Id.* § 6501(8).

collection organization providing such opportunity.¹²¹

This bill does not focus on location information. Indeed it does not even mention such information in its definition of personally identifiable information.¹²² Additionally, the bill proposes an opt-out requirement for data collection organizations' use of personal information, which, as discussed below, may not be an adequate protection for the more invasive location information disclosure.¹²³

Although the protections for location information disclosure by cell phone providers are not likely to apply to GPS implant providers,¹²⁴ it is worth noting that there is a bill entitled "Wireless Privacy Protection Act of 2003" proposing to further restrict the disclosure of such information.¹²⁵ The bill defines the process of what it would mean to give "express prior authorization" under 47 U.S.C. § 222(f). The proposed bill states that

[A] customer shall not be considered to have granted express prior authorization for purposes of subsection (f) unless—

(1) the carrier has provided the customer in writing a clear, conspicuous, and complete disclosure of the carrier's practices with respect to the collection and use of location information, transaction information, and automatic crash identification information, before any such information is disclosed or used, and such disclosure includes—

(A) a description of the specific types of information that is collected by the carrier;

(B) how the carrier uses such information; and

(C) what information may be shared or sold to other companies and third parties;

(2) the customer has agreed in writing to the collection and use of such information, or has agreed in writing to such collection and use subject to certain limitations; and

(3) the carrier has established and maintains reasonable procedures to protect the confidentiality, security, and integrity of the information the carrier collects and maintains in accordance with such customer consents.¹²⁶

This bill appeared in a previous session of Congress as well.¹²⁷

The language of this bill is rigorous in its prerequisites for disclosure. Not

121. Consumer Privacy Protection Act of 2003, H.R. 1636, 108th Cong. § 103(a) (2003).

122. *Id.* § 3(4).

123. For a competing bill with principally the same aims, i.e., privacy of personally identifiable information, see S. 745, 108th Cong. (2003).

124. *See supra* Part III.B.5

125. Wireless Privacy Protection Act of 2003, H.R. 71, 108th Cong. (2003).

126. *Id.* § 2.

127. *See* H.R. 260, 107th Cong. (2001).

only does it require prior permission in writing, but it requires minimal privacy procedures on the part of the carrier. These specific requirements for the term "express prior authorization" should serve as a model for any GPS implant legislation because they would give the GPS implant consumer adequate information to make an informed decision about allowing the GPS implant provider to disclose his or her location information.

B. Opt-in Versus Opt-out

As discussed above,¹²⁸ the implications of an opt-in versus an opt-out system of consent to release of private location information can have enormous effects on the likelihood that consumers will in fact opt for the protection. In an opt-out system many consumers will allow the disclosure of their location information because they did not bother to read the fine print in the contract for their technology. Although GPS implant consumers will be well aware of the location capabilities of the technology they are purchasing (unlike many cell phone purchasers) and may pay closer attention to the paperwork accompanying their purchase, an opt-in requirement for release of location information is preferable.¹²⁹

An example of legislation that uses the opt-in mechanism for privacy protection is the Driver's Privacy Protection Act of 1994 (Driver's Act).¹³⁰ The Driver's Act imposes an opt-in requirement on state departments of motor vehicles before they may disclose or sell drivers' information for marketing use. The requirement used to be opt-out, but was changed to opt-in in 1999.¹³¹

Conceivably, a person's location information (in mass, available twenty-four hours a day, seven days a week through the GPS implant) would be as private if not more private than the information listed on a driver's license and the associated driver's information such as speeding tickets. Thus, any legislation aimed at the privacy of consumers with GPS implants should have an opt-in mechanism.

Perhaps GPS implant legislation should prohibit release of location information for GPS implant hosts because the device is so permanent and safety driven. Customers might not even fathom how their location information could be used, and perhaps they should be given greater protection. After all, if

128. See *supra* text accompanying notes 58-59 for definitions of the opt-in and opt-out standards.

129. The Digital Angel privacy policy available on its internet site offers customers "the opportunity to opt-out of receiving communications from us or others." Digital Angel Corp., *Digital Angel Privacy Policy*, *supra* note 32. This demonstrates, that if left to their own devices, ADS and other GPS implant providers likely would at most provide opt-out privacy protection.

130. 18 U.S.C. §§ 2721-2725 (2000).

131. Pub. L. No. 106-69, §§ 350(c), (d), and (e), 113 Stat. 986 (1999); *see also* *Reno v. Condon*, 528 U.S. 141, 145 (2000) (upholding requirement that states obtain "a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes" against Commerce Clause attack).

customers want to take advantage of location based services (the primary purpose for which companies would want to buy the location information), they could always use a cell phone that is equipped with GPS for 911 purposes and utilize the services that wireless providers will be developing in the coming years.

Even if Congress deems it inappropriate to have a prohibition on the release of all customers' location information, there is one type of customer that Congress would be likely to protect with a blanket prohibition—children. There should be a blanket prohibition on release of a child's location information to third parties besides law enforcement. A child's whereabouts are not likely to interest a third party marketing or sales company as much as an adult's whereabouts, so in the interest of protection from the criminal elements of society,¹³² location information from children should be prohibited from disclosure. This would be an even harsher measure than that taken in the Children's On-line Privacy Protection Act.¹³³

C. Limitations on Legislation

Any suggestions for new legislation would be incomplete without a discussion of Constitutional and other limitations on such legislation. In order for such legislation to be effective, it would have to withstand challenges in court regarding Congress' authority to pass such legislation and First Amendment challenges to the restriction of commercial speech.

Congress would likely have the authority to make privacy law for GPS implants under the Commerce Clause.¹³⁴ The information contained on driver's licenses has been considered an article of commerce subject to federal regulation.¹³⁵ Likewise, GPS implants would presumably be used across states lines, although their use in commerce would not be nearly as pronounced as in driver's licenses, at least if the privacy advocates have their way. Congress might even be able to regulate location information by virtue of the fact that the implant providers would be using federal government data generated from the GPS satellites.

One might think that Congress could simply pass a law that prohibits GPS implant providers from using their customer's location information to sell other products or from selling the location information itself to third party companies. However, such legislation might not be possible because of Constitutional constraints. As discussed above,¹³⁶ the FCC was prohibited from requiring an

132. See *supra* text accompanying notes 37-38.

133. See *supra* Part III.C.2.

134. U.S. CONST. art. I, § 8, cl. 3.

135. In *Reno v. Condon*, the court reasoned that driver's information is an article of commerce because it "is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring." *Reno*, 528 U.S. at 148.

136. See *supra* Part III.B.3.

opt-in system for telecommunications providers' use of CPNI for services outside the scope of the existing service relationship.¹³⁷

If *U.S. West* were to be applied to GPS implant customer privacy legislation, it might limit the protections available for implementation based on the second prong of *Central Hudson*. The court in *U.S. West* found that the government failed to prove that the regulation directly and materially advanced the state's interests.¹³⁸ The court reasoned that "while protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI" since the government failed to present evidence "regarding how and to whom carriers would disclose CPNI."¹³⁹

This requirement of evidence regarding disclosure of the information sought to be protected could be a significant problem for privacy legislation covering GPS implants. GPS implants are not even on the market yet, and when they are available they may be slow to gain in popularity and acceptance. Under the standard articulated in *U.S. West*, legislators may have to wait until disclosure of GPS hosts' location information becomes a problem before they could justify privacy restrictions of an opt-in sort. Yet, a lack of legislation or rulemaking could dampen the market for GPS implants and even the federal government acknowledges this risk:

We should do this [privacy rulemaking] *before* location technology investments are made, so that industry isn't forced to retool later, at far more expense. We should do so before consumers make up their minds about whether they trust location practices, rather than fighting an uphill battle to regain consumer confidence after it has been lost.¹⁴⁰

Thus, Congress is faced with a Catch-22. Its legislation may be subject to invalidation by the courts if it legislates before the privacy problem has been made manifest, but if it waits to legislate, the market for the new technology may be suppressed because consumers are afraid to buy the new technology without legislative safeguards. Yet, perhaps a reviewing court would lean in favor of privacy given that the information at issue in the case of GPS implants is accurate location information rather than the more generalized CPNI which includes names and addresses—information for which consumers have less of a privacy expectation.

Any new legislation aimed at consumer privacy for GPS implants will need to have its purpose defined in each of the provisions of the legislation. Courts are unwilling to apply broad purposes of acts to individual provisions because "blind adherence to broad purposes can obfuscate Congress' true intent regarding

137. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999).

138. *Id.* at 1237.

139. *Id.*

140. Request by Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices, 17 F.C.C.R. 14832, 14839 (2002) (Statement of Commissioner Michael J. Copps, dissenting) (emphasis in original).

a particular provision.”¹⁴¹ For example, Congress might pass a bill regulating GPS implants that was aimed at the health and safety of the wearer since the FDA declined to regulate VeriChips as medical devices.¹⁴² This bill could also include consumer privacy measures, but Congress would need to rearticulate the purpose of such sections to avoid confusion and possible weakening of the measures when courts are called upon to interpret the legislation in light of free speech challenges.

It is possible that federal legislation could leave the door open for states to create their own legislation. However, given the borderless operation of GPS, perhaps federal legislation should expressly state that it fills the field and preempts any attempts at state legislation.

D. Alternatives to Legislative Protection of Privacy

An alternative to legislation to protect consumer privacy of location information is industry self-regulation.¹⁴³ In this manner, GPS implant providers could regulate consumer privacy on their own by providing privacy policies for consumer review and abiding by those policies. However, “[s]ince the economic incentive to provide strong privacy protections is either weak, nonexistent, or at least nonuniformly distributed among all participants in the marketplace, most serious proposals for self-regulation among market participants rely on the threat of government regulation if the data collectors fail to regulate themselves sufficiently.”¹⁴⁴

Additionally, the GPS implant industry may be an imperfect market in which to apply self-regulation of privacy. There is only one company—ADS—poised to enter the GPS implant market. Consequently, there would be a lack of choice and bargaining power that is the hallmark of a functioning market approach (assuming customers have enough information to realize the potential abuses of their privacy).¹⁴⁵ Therefore, self-regulation is not an adequate remedy to consumer privacy concerns surrounding location information.

CONCLUSION

The potential applications for GPS personal location devices are limitless. Such devices could track a lost or kidnapped child, locate an adult with

141. *U.S. West*, 182 F.3d at 1237 n.10 (finding that Congress’ primary purpose in the CPNI provision was customer privacy, not the broader purpose of increasing competition that was expressed in the Telecom Act).

142. See Press Release, Applied Digital Solutions, FDA Ruling—Subdermal VeriChip Is Not a Regulated Medical Device “For Security, Financial, and Personal Identification/Safety Applications” (Oct. 22, 2002), at <http://www.adsx.com/news/2002/102202.html>.

143. Frank Douma & Milda K. Hedblom, *Wireless Communication Applications for Transportation: User Boon or Booby Trap?*, 27 WM. MITCHELL L. REV. 2163, 2173 (2001).

144. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1524 (2000).

145. See Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 890-903 (2002) (discussing market failures in self-regulation of privacy).

Alzheimers who has wandered off, or simply allow family members to keep track of each other's whereabouts. But along with these benefits come some unforeseen risks. These risks become apparent when looking at a similar location technology—Enhanced 911 cell phones. As Enhanced 911 cell phones have shown, location information providers have realized that the information they are collecting is valuable to third parties,¹⁴⁶ and, as a result, personal location information can end up in the hands of marketers and businesses—contrary to the expectations of consumers.

Congress saw the need for statutory protection of location information gathered from cell phones and responded with the Telecommunications Act of 1996 and the Wireless Communications and Public Safety Act of 1999.¹⁴⁷ However, the current privacy requirements are not adequate because so many consumers will not read the fine print or understand the implications of allowing their location information to be sold to third party marketing firms and other types of companies.

Even the inadequate protection for location information from cell phones would not apply to the new personal location devices proposed by ADS.¹⁴⁸ Currently, no laws would prevent ADS from selling location information to marketing firms or any other interested parties, and no laws would even require consumer consent before the release of this information.

Privacy legislation is needed to protect GPS implant consumers' location information from disclosure to third parties. Although GPS implants are not yet on the market, legislators should act now if they wish to encourage the use of this fascinating new technology. Without privacy protections in place, consumers may be too afraid to use the new technology.

The protection for cell phone users' location information can serve as a guide for new legislation, but the protection for GPS implants must be stronger than that for information gathered from a cell phone because of the permanency of the implant—implant hosts would be unable to turn their GPS device off or leave it at home since the GPS device is surgically implanted under their skin. Even if the potential disclosure of sensitive location information has not crossed the mind of the average consumer, legislators should act quickly to protect consumers from this danger by creating an opt-in mechanism for the release of location information from GPS implants. Not only will the opt-in mechanism create a default rule of protection, but it will also require education of the consumer by the GPS implant provider about the potential uses for location information should the consumer be willing to allow disclosure of location information.

146. See *supra* note 25 and accompanying text.

147. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§151-710 (2000)); Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, § 5, 113 Stat. 1288-1289 (1999). See *supra* Part III.B.

148. See *supra* Part III.B.6.

THE DAY THE MUSIC DIED: THE RIAA SUES ITS CONSUMERS

ANDREW C. HUMES*

INTRODUCTION

In early September 2003, the Recording Industry Association of America (RIAA)¹ brought suit against 261 people accusing them of copyright infringement² for allegedly downloading and uploading copyrighted music from the Internet using peer-to-peer systems such as Kazaa, iMesh, Grokster, Gnutella and Blubster.³ The decision by the RIAA to pursue the users of services like Kazaa and others was somewhat unexpected. Many commentators had predicted that the RIAA would never bother going after individual users due to the potential public relations nightmare it could create, along with the logistical difficulties posed by finding and suing individual users.⁴ The fact that the RIAA has actually gone after individual computer users illustrates the lack of confidence the recording industry has in future legal battles against file-sharing entities such as Kazaa and the desperate position in which it finds itself. The avenues that the RIAA and the music industry have available to pursue against companies like Kazaa are not completely blocked, and undoubtedly there will be future litigation. In the meantime, the record conglomerates are tired of losing money due to illegal downloads and have chosen to go after those they feel are stealing from them—the users themselves.⁵ Since the first round of lawsuits filed in September 2003, the RIAA has filed over 2000 additional lawsuits in at least five more rounds of litigation.⁶ This Note looks at the complaints filed against

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1. The RIAA represents many of the major record companies including: UMG Recordings Inc.; Sony Music Entertainment Inc.; Virgin Records America Inc.; Elektra Entertainment Group Inc.; Capitol Records Inc.; Arista Records Inc.; and BMG Music. The RIAA litigates on behalf of the companies regarding various matters, most notably as of late are issues surrounding copyright infringement using the Internet.

2. See <http://www.riaa.com/news/newsletter/pdf/sampleComplaint.pdf> (last visited Nov. 24, 2004) (providing a sample complaint filed against the defendants seeking damages under 17 U.S.C. § 504(c) and fees and costs pursuant to 17 U.S.C. § 505).

3. See Jon Healey et al., *Song Swappers Face the Music*, L.A. TIMES, Sept. 9, 2003, at A1.

4. Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 490 (2002); Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2246 (2002); Jennifer Norman, Note, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J. L. & ARTS 371, 392 (2003).

5. See Greg Kot, *Music Industry Chooses to Bite Hand that Feeds It*, CHI. TRIB., June 29, 2003, at 10 (describing an advertisement placed in the *New York Times* by the RIAA that compares suing music customers with prosecuting shoplifters).

6. See Press Release, RIAA, Music Industry Commences New Wave of Legal Action Against Illegal File Sharers (Dec. 3, 2003) (forty-one additional suits filed), available at

the defendants accused of copyright infringement and will focus on defense strategies and theories that could possibly be used against them. Additionally, this Note points out potential problems surrounding the complaints, such as when the downloading or uploading was done by a minor.

Part I of the Note gives an overview of music on the Internet. It describes different models and systems that have been used, or are currently being used, by people to download MP3⁷ files from the Internet. It also briefly explains the technology behind these systems in order to make distinctions between them. In Part II the sparse case history dealing with music file-sharing is reviewed. This is done to further understand the position the RIAA now finds itself in and also to review the reasoning used by courts when making determinations regarding the activity of the users themselves. Part III briefly illustrates the problems that the RIAA or a court could find with using past cases dealing with music file-sharing as precedent in the current lawsuits. Part IV of the Note explores the fair use doctrine and a defense based on the Audio Home Recording Act (AHRA)⁸ that a hypothetical defendant could employ. Part V focuses on problems surrounding the lawsuits such as when the downloading has been done by a minor and the possible liability their parents could face, if any. Part VI explores solutions that could satisfy concerns of both the RIAA and individual users.

I. OVERVIEW OF INTERNET MUSIC FILE-SHARING

Although the practice of sharing song and other files on the Internet is relatively new, the technology used has morphed and branched off considerably since its inception. The speed at which technology advances is obvious and perhaps in no other area can this be seen as plainly as it can when looking at the ways computer users have avoided the outstretched arm of copyright law on the Internet.

<http://www.riaa.com/news/newsletter/120303.asp>; Press Release, RIAA, New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers (Jan. 21, 2004) [hereinafter New Wave of Record Industry Lawsuits] (532 additional suits filed), *available at* <http://www.riaa.com/news/newsletter/012104.asp>; Press Release, RIAA, 531 More File Sharers Targeted in Latest RIAA Legal Efforts (Feb. 17, 2004) (531 additional suits filed), *available at* <http://www.riaa.com/news/newsletter/021704.asp>; Press Release, RIAA, RIAA Brings New Round of Cases Against Illegal File Sharers (Mar. 23, 2004) (532 additional suits filed, including 89 against users of university systems), *available at* <http://www.riaa.com/news/newsletter/032304.asp>; Press Release, RIAA, New Wave of Illegal File Sharing Lawsuits Brought By RIAA (Apr. 28, 2004) (477 additional suits filed, including sixty-nine against users of university systems), *available at* <http://www.riaa.com/news/newsletter/042804.asp>.

7. MP3 technology “makes digitized songs into smaller, easily transferable files, notably free of any restrictive copy-management technology.” Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 458 (2002). Soon after MP3 technology became available, software capable of converting CDs into MP3 format also became available.

8. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2000).

A. *Napster*

The creation of Napster was undoubtedly revolutionary. This statement is not a novel or unique observation, or one that has not been thoroughly researched and written upon. However, to understand the litigation involving the RIAA and individual song downloaders, it is necessary to have a basic understanding of the history of Napster and what other programs have done since.

Napster was created as a service to allow computer users access to song-files from the Internet. It did so by utilizing peer-to-peer (P2P) technology. P2P technology generally allows users connected to the Internet to communicate with other users whose computers are connected.⁹ “Peer-to-peer . . . pools the resources of those connected to the Internet and makes those resources available to whomever is connected to that particular peer-to-peer network.”¹⁰ To access Napster a user merely had to download Napster’s MusicShare software. Once downloaded and registered with an account name and password, a user could access the centralized database that contained songs and other files from the computers of other users who used Napster.¹¹ To download a song, a user searched Napster for the song and was sent another user’s IP address that had the requested song and the computers connected allowing the download.¹² “Therefore, although no content [was] stored on, or passed through the central server, the centralized search system arguably [facilitated] file-sharing.”¹³

B. *Post-Napster Technology*

When Napster was shut down by the courts, many other companies created software programs that were like Napster, only with key differences. These companies were primarily attempting to build and design around problems that plagued Napster in court. The most basic change that many of the companies like Kazaa implemented was doing away with the centralized server. “Unlike Napster, the decentralized model of peer-to-peer networking does not use a central server to establish peer-to-peer connections or facilitate searches. Instead, decentralized peer-to-peer networking creates a community of users by pooling the IP addresses of other users connected to the Internet.”¹⁴ Essentially, this creates a branching structure that allows the user to have access to the computers of numerous other users and thereby minimizes the role of facilitators such as Kazaa. Additionally, upon registering for an account name, Kazaa users were required to give additional information such as their names and addresses.

9. Jacover, *supra* note 4, at 2213.

10. *Id.*

11. Llewellyn Joseph Gibbons, *Napster: The Case for the Need for a Missing Direct Infringer*, 9 VILL. SPORTS & ENT. L.J. 57, 64 (2002).

12. Norman, *supra* note 4, at 373.

13. *Id.*

14. Jacover, *supra* note 4, at 2216.

C. Current Technology

The author is reluctant to give this subheading the title "Current Technology" because as Professor Honigsberg said in his essay about Napster, "[j]ust like the technology upon which this essay is based, the essay itself will be out of date the moment the typing stops."¹⁵ However, there are some new programs and services available for users on the Internet that differ somewhat from those in the past. It has been hard to miss the advertisements for the "new" Napster service as they have appeared in magazines, on the Internet, and on television. The "new" Napster will be similar to many other existing services, in that it will be charging users to download songs from its database. There are different options; a user could pay a small fee for a single song (usually between \$1-\$2 for most services) and some services allow paying a monthly fee for unlimited downloads. There are many conflicting statements regarding the popularity of these services and it is too early to tell if they can replace so-called "free" sites like Kazaa. Additionally, a service called WinMX is available which provides users a chance to download songs on a peer-to-peer network anonymously, in as much as no personal information is given.¹⁶ The sites offering software programs are taking deliberate steps to remove themselves from their users as much as possible so as to reduce any supervisory role they might have.

Finally, the music industry has made many attempts to counter copyright infringement through technological means. The industry has toyed with the CDs themselves, by putting "watermarks" and "fingerprinting" on them. Watermarking involves encoding signals onto the CD that are capable of surviving conversion from analog to digital music.¹⁷ When a song is listened to on the Internet the signal can be read by the computer and can deliver to licensing bureaus the song title, artist name and even the serial number of the music.¹⁸ The fingerprint is virtually identical except that it also protects music that was already online.¹⁹ As one author has noted, this capability raises serious privacy concerns amongst consumers.²⁰ Additionally, some members of the music industry have teamed up with Microsoft to create CDs with Digital Rights Management (DRM) technology. The DRM technology will not allow a CD to be played on a computer unless Microsoft Windows Media Player is used, thereby limiting a

15. Honigsberg, *supra* note 4, at 473 n.1.

16. See Frontnode Technologies, *WinMX: The Best Way to Share Your Media*, at <http://www.winmx.com> (last visited Jan. 9, 2005).

17. Amy K. Jensen, Comment, *Copy Protection of CDs: The Recording Industry's Latest Attempt at Preventing the Unauthorized Digital Distribution of Music*, 21 J. MARSHALL J. COMPUTER & INFO. L. 241, 249 (2003).

18. *Id.* (citing Konrad Roeder, *How Watermarks Protect Copyrights*, available at <http://www.mp3.com/news/424.html?hparticle1> (Nov. 4, 1999)).

19. *Id.* (citing Bruce R. Poquette, *Current Public Law and Policy Issues: Information Wants to be Free*, 22 HAMLINE J. PUB. L. & POL'Y 175, 176 (2000)).

20. *Id.* at 261-62.

user's ability to use song-files on a server or MP3 player.²¹

There is little doubt that by the time this Note reaches publication, many of the "current technologies" will not be so current, but this is the nature of the beast.

II. THE COURTS AND FILE-SHARING

Although there is very little in the way of precedent regarding file-sharing, the few cases that have been decided have had substantial repercussions on the music and computer industries. No rulings have been more significant with respect to file-sharing than the ones involving Napster.

A. *Napster—District Court*

The music industry sued Napster in the Northern District of California seeking a preliminary injunction to stop Napster and Napster users from downloading and uploading copyright protected song-files. The court granted the industry's injunction request and ordered Napster to "develop[] a means" to comply with the injunction.²² Although there were many issues of first impression decided by the court, this Note focuses on those surrounding the individual users themselves.

The court granted the preliminary injunction because it held that the plaintiffs showed a reasonable likelihood of success on contributory and vicarious copyright infringement claims.²³ To establish a contributory infringement claim in the context of copyright law, a plaintiff must show: direct infringement by the users; that the defendant had knowledge of the infringement; and either induced, caused or materially contributed to it.²⁴ To establish a vicarious liability claim the plaintiff must show that the defendant had the right and ability to supervise the user's infringing conduct and had a direct financial interest in it.²⁵ The court concluded that the plaintiffs had established a prima facie case of direct infringement, as they relied on data that suggested up to eighty-seven percent of music that was on Napster was copyrighted.²⁶ Napster argued that the users' conduct was protected by the affirmative defenses of fair use and a substantial non-infringing use. Napster argued specifically that user practices such as sampling, space-shifting and new artist distribution were each protected by fair use.²⁷ There are four factors taken into consideration when deciding whether a user's infringing activity warrants a fair use exception. They are:

21. *Id.* at 250 (citing John Borland, *New CDs Designed to End "Ripping,"* available at http://zdnet.com.com/2100-1106_2-530799.html (last visited May 7, 2004)).

22. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000).

23. *Id.* at 920, 922.

24. *Id.* at 911, 918.

25. *Id.* at 920.

26. *Id.* at 911.

27. *Id.* at 913.

1. the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.²⁸

Regarding the first factor the court said, "[a]scertaining whether the new work transforms the copyrighted material satisfies the main goal of the first factor . . . [but] the court must also determine whether the use is commercial."²⁹ The court was persuaded by two factors when reaching its decision that users' use of Napster was commercial. First, the court ruled that sending a file to an anonymous user with the aid of Napster was not engaging in personal use.³⁰ Second, the conclusion that some users did not pay for songs they normally would have bought showed the court that the users benefited economically.³¹ The court found that music was creative in nature and that when users downloaded songs they copied all of the copyrighted work, therefore the second and third factors of the fair use defense were not met.³² Finally, the court relied on plaintiff's experts to reach the conclusion that the effect on the market was substantial because it reduced CD sales amongst college students and it raised a barrier to the plaintiff's entry into the market for the digital downloading of music.³³

The court was not persuaded by Napster's fair use defenses of sampling or space-shifting made on behalf of all individual users. The court held that users did not merely sample the music because they could keep a complete copy of it after sampling.³⁴ Napster's space-shifting argument was based in part on the decision in *Sony Corp. of America v. Universal City Studios, Inc.*, which held that people who taped TV programs on their VCR tapes were merely time-shifting.³⁵ The court pointed to the plaintiff's evidence surrounding a study of college students that found they did not previously own much of the music they downloaded and hence, were using Napster for illegitimate purposes.³⁶

One important point to note regarding this Napster case and its subsequent appeal is that there was no actual individual user named as a defendant. Napster merely argued on behalf of all possible defendants when asserting fair use defenses.

28. 17 U.S.C. § 107 (2000).

29. *Napster*, 114 F. Supp. 2d at 912.

30. *Id.*

31. *Id.*

32. *Id.* at 913.

33. *Id.* at 910-11.

34. *Id.* at 913-14.

35. See generally 464 U.S. 417, 443 (1984).

36. *Napster*, 114 F. Supp. 2d at 915-17.

B. *Napster—Court of Appeals*

The court of appeals agreed with the district court that the plaintiffs would likely succeed in showing that Napster users did not have a valid fair use defense, and that Napster was a contributory³⁷ and vicarious infringer.³⁸ The court held that neither the *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*³⁹ decision nor the *Sony Corp. of America* decision⁴⁰ applied to Napster's space-shifting fair use defense because when a user posted a song to the centralized system in order to access it in a different location the user was simultaneously making it available to many other users.⁴¹

Additionally, the court held that Napster users did not have a valid defense under the Audio Home Recording Act (AHRA).⁴² The AHRA was created primarily to protect consumers. The court in *Diamond* looked into the legislative history of the Act and said, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, non-commercial use*."⁴³ A specific section of the Act spells out the protection provided:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium . . . or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog music recordings.⁴⁴

Napster argued that the MP3 music-file downloading its users participated in was protected under the AHRA. The court held that computers were not digital audio recording devices under the AHRA because their primary purpose was not to make digital audio copied recordings and because computers do not make digital music recordings.⁴⁵ However, the court leaned exclusively on the analysis done by the court in *Diamond* in reaching these conclusions.

C. *Aimster and Metro*

1. *Aimster*.—Aimster (currently Madster) was a software program that

37. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

38. *Id.* at 1022.

39. 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that a portable MP3 player merely space-shifts copies of the music-file from a user's hard drive).

40. *Sony Corp. of Am.*, 464 U.S. at 443.

41. *Napster*, 239 F.3d at 1019.

42. *Id.* at 1024; 17 U.S.C. § 1001-1010 (2000).

43. *Diamond*, 180 F.3d at 1079 (quoting S. Rep. No. 102-294, at 86 (1992) (emphasis added in case)).

44. 17 U.S.C. § 1008 (2000).

45. *Napster*, 239 F.3d at 1024.

allowed users to download files from each other by piggybacking onto AOL's instant messaging service.⁴⁶ It was more of a peer-to-peer system than Napster but, "certain aspects of the system, especially the existence of Club Aimster's 'Top 40' list, indicate that Aimster did have some sort of centralized structure."⁴⁷ The Northern District Court of Illinois ruled that Aimster was subject to a preliminary injunction based on contributory and vicarious liability.⁴⁸ The court held that because users were potentially sharing files with many others it was not a personal use and the AHRA did not apply.⁴⁹

2. *Metro*.—In *Metro-Goldwyn-Mayer, Inc., v. Grokster, Ltd.*, the defendants Streamcast and Grokster filed summary judgment motions in regards to their alleged contributory and vicarious infringement for users who file-shared using their technology, "Morpheus" and "Grokster (FastTrack)" respectively, to download and upload music-files.⁵⁰ The court held that there was direct infringement by the users, but there was no contributory or vicarious liability attributable to the defendants, and granted summary judgment in their favor.⁵¹ The peer-to-peer software systems used by the defendants were not as centralized as the Napster software was. Therefore, the court held that neither defendant had actual or specific knowledge of specific infringement at a time when they were materially contributing to it, and they were not in a position to supervise the infringing conduct because the technology used was more peer-to-peer rather than centralized.⁵²

D. Verizon

In a move one author called "actions that are a mere step away from suing direct infringers,"⁵³ the RIAA sought to obtain the identity of an anonymous Internet Service Provider (ISP) user alleged to have offered hundreds of copyrighted songs over the Internet, without first filing a complaint. The district court (twice) held that Verizon needed to comply with the subpoena, forcing them to give the RIAA the user's identifying information.⁵⁴ During the completion of this Note, the Court of Appeals for the D.C. Circuit overturned the district court's order to deny Verizon's motion to quash and the United States Supreme Court has since denied certiorari.⁵⁵ The RIAA can still find the identity

46. Norman, *supra* note 4, at 384.

47. *Id.* at 387.

48. *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 666 (N.D. Ill. 2002).

49. *Id.* at 649.

50. 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

51. *Id.* at 1046.

52. *Id.* at 1038, 1044-46.

53. Norman, *supra* note 4, at 392.

54. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 45 (D.D.C. 2003) (granting the RIAA's motion to enforce the subpoena on the ISP); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 247 (D.D.C. 2003) (denying Verizon's motion to quash the RIAA's subpoena).

55. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C.

of suspected infringers, but the big difference now is that they must file “John Doe” lawsuits in court first, and then get a subpoena through a judge to get the individual’s name and address.⁵⁶ The accused infringers should have the right to contest any charges brought against them before their identities are revealed. Although the recent ruling should not affect subpoenas previously served, it is likely that any individual that has been served and sued already would direct the court’s attention to the recent ruling. During the completion of this Note, the RIAA filed four rounds of lawsuits against users after the court of appeals decision.⁵⁷ The RIAA filed “John Doe” suits,⁵⁸ partly in a perceived effort to alert users that the recent ruling would not shield them from liability.

E. The RIAA’s Increasingly Desperate Position

As noted earlier, many commentators did not expect the RIAA to pursue litigation against individual file-sharers. It is logical to assume that suing the very people you depend on for survival would be a last resort. In fact, even the RIAA itself had stated that they would not pursue litigation against direct infringers.⁵⁹ However, it is apparent that the recent cases have forced the RIAA’s hand. The fact that the court in *Metro* held that the defendant peer-to-peer operators were not liable for contributory or vicarious infringement was a big blow to the RIAA. The ruling by the D.C. Court of Appeals in *Verizon* was not as decisive a blow, but will require much more time and resources to be spent when pursuing litigation against accused infringers. The bottom line is that the RIAA, and the music industry as a whole, is slowly losing the grip it once had on its copyright protected music.

III. PROBLEMS WITH USING PAST CASES WHEN DEALING WITH SUITS AGAINST DIRECT INFRINGERS

There are some potential concerns with using past case holdings dealing with file-sharing in regards to lawsuits filed against individuals. Most notably, file-sharing cases have only made it to the court of appeals level and therefore, they are not binding upon other jurisdictions. Additionally, in the past cases, there has not been an individual defendant in place to present an argument against his or her direct infringement.

A. The Cases on Point Are Not Binding

The *Napster* cases have been analyzed and used by subsequent courts when

Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

56. See John Borland, *Court: RIAA Lawsuit Strategy Illegal*, CNET News.com (Dec. 19, 2003), available at <http://news.com.com/2100-1027-5129687.html?tag=nl>.

57. See *supra* note 6 and accompanying text.

58. New Wave of Record Industry Lawsuits, *supra* note 6.

59. Jacover, *supra* note 4, at 2246 (citing Lee Gomes, *Music Free Tunes for Everyone!*, WALL ST. J., June 15, 1999, at B1).

dealing with the issue of file-sharing, but courts (except the Ninth Circuit) are not bound by the decisions made or reasoning used. It would be logical to assume that if any court were to follow the lead of the *Napster* cases, it would be one in the jurisdiction of the same (Ninth) circuit, yet the court in *Metro* found that the peer-to-peer systems used were not liable or essentially responsible for catching the people who used their system.⁶⁰ Even the court in *Aimster*, which essentially followed the ruling in *Napster*, disagreed with some significant conclusions the court in *Napster* reached.⁶¹ The point to be made is that a court could find that the past cases dealing with file-sharing are not persuasive and either a fair use defense or a defense based on the AHRA could apply in the case of an alleged direct infringer.

B. No Individual File-Sharer Was Directly Involved

One commentator has noted that having a specific infringer in place during the *Napster* cases would have facilitated the fact-finding process and would have given the case a human face.⁶² As Professor Gibbons said,

[t]he district court erroneously conflated unauthorized use with infringing use because the district court's analysis took a global view of whether collective activities by Napster users were excused under the theory of fair use. This approach was also adopted by the Ninth Circuit. However, Napster's individual users may have been protected under some paradigm of fair use because fair use is always an individual determination that depends upon the unique facts of the particular alleged infringing use. Because no alleged direct infringers were before the court, the court could therefore rely on a sense of collective wrongdoing as it assumed at least some use must be an infringing use due to the sheer size of the Napster enterprise.⁶³

Through forcing subpoenas on ISPs like Verizon, the RIAA was able to determine the identities of individuals who supposedly uploaded or downloaded material to which the RIAA owned the copyright. With the focus of the lawsuit being on the defenses asserted against charges of direct infringement and not merely as a means to establish a basis for contributory or vicarious liability, the fair use factors or a defense based on the AHRA could be viewed in a different light by a judge or jury. A major goal of any defendant being sued by the RIAA for file-sharing would be to at least get the case to a jury.

60. *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003).

61. *In re Aimster Copyright Litig.*, 334 F.3d 643, 649 (7th Cir. 2003).

62. Gibbons, *supra* note 11, at 60.

63. *Id.* at 77-78 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991); *People v. Collins*, 438 P.2d 33, 39 (Cal. 1968)).

Given that half of the Internet users in the United States have used a file-sharing network, the odds are high that a jury member would know someone who has downloaded music improperly. Those jurors could be sympathetic. . . . [Juries] might also consider something they are not supposed to under copyright law: intent.⁶⁴

All this being said, the RIAA has stated that it intended to pursue file-sharers who had downloaded or uploaded hundreds of copyrighted songs and it is undoubtedly true that some infringement took place. However, it is possible that a judge or jury could find that a person of age, who knowingly downloaded or uploaded many songs, could have a valid affirmative defense under the fair use doctrine or the AHRA.

IV. THE DIRECT INFRINGER

A. *The Fair Use Doctrine*

An individual using the fair use doctrine as an affirmative defense would likely make arguments similar to Napster: that they were merely sampling the downloaded material; they were space-shifting files; and/or they were only downloading songs they already owned. A defendant would be hard pressed to make a substantial argument suggesting they complied with the second and third fair use factors because the nature of the music files is creative, is for entertainment purposes and (in most cases) the entire song was likely downloaded. However, a court must balance the four fair use factors collectively. Therefore, a defendant could make a strong argument that the first and fourth factors are in their favor. “[I]ndividuals who try a fair-use defense have a chance of winning on the first and fourth tests, some experts believe. Theoretically, they could fight to a draw.”⁶⁵

1. *The First Factor: The Purpose and Character of the Use.*—Downloading music does not appear to transform the copyrighted music in any meaningful sense and it would be hard to imagine a scenario where a defendant could make a legitimate argument that he or she actually transformed the music. However, under the first factor, a court must also take into account whether or not the activity was commercial.⁶⁶ The district court in *Napster* reasoned that because a user sends files to anonymous requesters and does not have to actually buy the songs, the use is a commercial activity.⁶⁷ There are problems with this analysis for a few reasons.

One main problem with the *Napster* decision is that it singled out users that allow others to download from them. Napster’s centralized structure required a user requesting a song file to be routed by Napster to another user willing to let

64. Joseph Menn, *Suits Could Clarify File-Sharing Rules*, CHI. TRIB., Sept. 8, 2003, at C1.

65. *Id.*

66. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

67. *Id.* at 912-13.

someone download from them.⁶⁸ Systems like the one used by Kazaa and others that are peer-to-peer systems can be used by an individual without allowing others to download files from them. With this system in place, a user could use the system without sending files to anonymous requesters. Furthermore, it is highly likely that some users were not aware that their system was set up to allow others to download from them. Although ignorance would not be a defense in and of itself, one could easily conceive of a judge or jury sympathizing with a defendant who emphatically and honestly stated they did not understand the technology involved and were not aware that they were allowing others to download from them.⁶⁹ However, in the first 261 suits filed, the RIAA stated it was targeting offenders “who shared a significant number of songs on peer-to-peer networks.”⁷⁰ If a defendant knowingly allowed others to download files from his or her computer, the *Napster* holding would seem logical in this regard. If the defendant unknowingly allowed others to download songs, his or her role in sending files to anonymous requesters becomes much less clear.

Secondly, there are many legal scenarios that involve an individual listening to copyrighted music without having bought it that are acceptable. For example, people do not pay anyone directly to listen to the radio, and there are sound booths set up in many record stores that allow people to listen to and sample selected CDs. Gibbons took issue with the *Napster* court’s reliance on studies done that showed college students bought fewer CDs because of Napster.⁷¹

The [district] court stated that students are more likely to download “free” music by using Napster [rather] than purchasing the CD. This likelihood, however, does not necessarily militate against a finding of fair use. If students bought fewer CDs after deciding they did not value the songs from those CDs, for example, then this action may constitute a fair use. This scenario resembles the business strategy of placing music listening stations in record stores, which the Copyright Act exempts as a non-infringing activity. . . . [o]ne can argue that Napster provided a convenient listening station similar to those in music stores that allow a purchaser to preview the CD before they buy it; one that does not require the purchaser to stand around in a store for long periods of time wearing headphones glazed with the ear wax of hundreds of

68. Norman, *supra* note 4, at 373.

69. For example, when the user downloaded the software, the system could require them to uncheck an onscreen box to prevent others from downloading material from them, or a system could require a user to change the system settings once the software was downloaded in order to restrict others’ ability to download from them. See Menn, *supra* note 64, at C1 (stating “[s]ome file swappers have told the networks that they didn’t want to share music—but didn’t realize that when they downloaded a file, the new music was still placed in a folder that could be accessed by others”).

70. See Healey et al., *supra* note 3, at A1.

71. Gibbons, *supra* note 11, at 79-80.

preceding patrons.⁷²

It seems the main point the *Napster* court was trying to make was that a person could download and keep the music without having paid for it, hence it is a “commercial” activity. However, it is obvious a person can record songs from the radio and could copy a CD for personal use without violating copyright law.⁷³ Additionally, there was nothing in the *Napster* opinion regarding the length of time users kept songs they downloaded as being dispositive of showing a commercial activity. It could be argued that a user who downloaded a single song, listened to it, and then promptly deleted it, could not be said to have derived an economic benefit from participating in a commercial activity.

The space-shifting argument could hold some merit when made by an individual as well. Suppose a person was merely downloading a song they already owned in order to have it on their computer. This plausible situation is one in which a judge or jury could find that there was no economic benefit or commercial activity. Again, as Gibbons reasoned, it becomes readily apparent that having a named individual defendant rather than relying on a collective sense of wrongdoing, could show that there was no commercial activity involved.⁷⁴

2. *The Fourth Factor: The Effect on the Market or Value.*—The determination of whether the use is commercial is important not only in the analysis of the first fair use factor, but also in the fourth factor because if the use is determined to be non-commercial, then the plaintiff bears the burden of showing that the practice would adversely affect the potential market if it became widespread.⁷⁵ Demonstrating the effect of downloading on the potential market or value of the music is typically going to entail an expert battle. The court in *Napster* preferred the plaintiff’s experts over the defendant’s.⁷⁶ This was likely due, in some degree, to the burden (of proving there was not an effect on the market or value of the music) falling on the defendant because of the ruling that the user’s downloading was a commercial activity.⁷⁷ If the activity had been viewed as being non-commercial, the burden would change and so, perhaps, would the weight given to expert testimony.⁷⁸

B. The AHRA

A defendant could also argue that his downloading was protected by the

72. *Id.* (citing *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 910 (N.D. Cal. 2000); 17 U.S.C. § 110(7) (1994)).

73. Jensen, *supra* note 17, at 251 n.81 (stating “it is noted that U.S. copyright law allows consumers to legally make one copy of a copyrighted work for their personal, private use”) (citing Richard Ellen, *New Audio CD Copy Protection May Already be Cracked*, available at <http://www.audiorevolution.com/news/0701/24.safeaudio.shtml> (July 24, 2001)).

74. Gibbons, *supra* note 11, at 60.

75. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

76. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 916 (N.D. Cal. 2000).

77. *Id.* at 924.

78. *Id.* at 912.

AHRA.⁷⁹ By looking at past holdings regarding file sharing and the AHRA, as well as the statute itself, it becomes apparent that a valid defense could be made. The AHRA is rich in technical language and is at times maddeningly frustrating to decipher. However, understanding the statutory language of the AHRA is what makes a defense based upon it possible.

1. *AHRA Requirements*.—In order for a direct infringer to gain protection from the AHRA, he or she essentially would be required to show that a computer is a “digital audio recording device.” In doing so a defendant would fall under 17 U.S.C. § 1008, which states,

[n]o action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, *or based on the noncommercial use by a consumer of such a device or medium for making digital music recordings or analog music recordings*.⁸⁰

Therefore, if a consumer were to use a computer to make non-commercial digital music recordings, they would be protected under the AHRA. As was previously discussed, it is clearly possible that a user could show the alleged use was non-commercial. Hence, a defendant must show that a computer is a “digital audio recording device.”

2. *The Napster Case: Rejecting the AHRA*.—The Ninth Circuit Court of Appeals in *Napster* rejected the defendant’s AHRA claim.⁸¹ The court held that the AHRA did not apply to the downloading of MP3s to computer hard drives.⁸² As noted earlier, the court relied extensively and exclusively on the ruling in *Diamond* when reaching this decision. The court stated,

[f]irst, “under the plain meaning of the Act’s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.” Second, notwithstanding *Napster*’s claim that computers are “digital audio recording devices,” computers do not make “digital music recordings” as defined by the Audio Home Recording Act.⁸³

There are some potentially significant flaws with the court’s decision that will be discussed next.

a. *The AHRA and Diamond*.—To analyze the reasons given by the court in *Napster*, it will be necessary to examine the *Diamond* case in order to understand the context in which the AHRA was used in that case and subsequently applied

79. 17 U.S.C. § 1001-1010 (2000).

80. *Id.* § 1008 (emphasis added).

81. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

82. *Id.*

83. *Id.* (citing *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1077-78 (9th Cir. 1999)).

verbatim in *Napster*. In *Diamond*, the RIAA brought suit against Diamond seeking a preliminary injunction.⁸⁴ Diamond manufactured and distributed the Rio music player which was a hand-held device that allowed a user to download MP3s from a computer onto the device and then listen to them through headphones. The RIAA was asserting that the Rio did not comply with AHRA requirements for “digital audio recording devices” because it did not have a Serial Copyright Management System (SCMS).⁸⁵ The AHRA requires “digital audio recording devices” to have a SCMS that sends and receives information regarding the copyright status of files it plays.⁸⁶ Additionally, the RIAA sought royalty payments from Diamond because manufactures and distributors of “digital audio recording devices” are required to pay them per the AHRA.⁸⁷ Essentially, the RIAA was arguing that the Rio was a “digital audio recording device” while Diamond asserted it was not.⁸⁸

The court determined that the Rio was not a “digital audio recording device” and therefore did not have to pay royalties or include a SCMS.⁸⁹ In reaching this decision the court analyzed the definition of a “digital audio recording device” to see if, in fact, the Rio fell within the statutory language.⁹⁰ Working its way through definitions that lead through other definitions, the court eventually decided that in order for the Rio to be a “digital audio recording device,” it must be able to reproduce “either ‘directly’ or ‘from a transmission’ a ‘digital music recording.’”⁹¹ The definition of a “digital music recording” according to the AHRA is:

A material object

- (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and
- (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.⁹²

The court then had to determine what material object the Rio directly reproduced from and concluded it was the computer hard drive.⁹³ Next, the court analyzed whether a hard drive fit the definition of a “digital music recording.” It held that a hard drive was not a “digital music recording” because hard drives contain

84. *Diamond*, 180 F.3d at 1072.

85. *Id.* at 1075.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1081.

90. *Id.* at 1075-76.

91. *Id.* at 1076.

92. 17 U.S.C. § 1001(5)(A) (2000).

93. *Diamond*, 180 F.3d at 1076.

more than fixed sounds, material, statements or instructions.⁹⁴ The court reasoned that because computer hard drives are not “digital music recordings,” the Rio (as a “digital audio recording device”) could not record directly from them.⁹⁵ Therefore, the Rio could not be a “digital audio recording device” according to the AHRA.⁹⁶

b. The problem with the Napster court’s second reason for why the AHRA did not apply to Napster users.—In the *Napster* case, Napster argued that computers themselves were “digital audio recording devices” just as the RIAA argued the Rio was a “digital audio recording device” in the *Diamond* case.⁹⁷ Simply going through the same steps the court in *Diamond* did to determine whether the Rio was a “digital audio recording device” will expose a serious flaw in the *Napster* court’s decision that a computer is not a “digital audio recording device.” Again, following *Diamond* (which the *Napster* court relied on), in order for a computer to be a “digital audio recording device,” it “must be able to reproduce, either ‘directly’ or ‘from a transmission,’ a ‘digital music recording.’”⁹⁸ Clearly, a computer is capable of directly reproducing a digital music recording such as a CD. The court in *Diamond* agreed when it explained the legislative history behind the AHRA and what constitutes a “material object” as referred to in the definition of a “digital music recording.” The court said,

[t]he Senate Report further states that the definition “is intended to cover those objects commonly understood to embody sound recordings and their underlying works.” A footnote makes explicit that this definition only extends to the material objects in which songs are normally fixed: “[t]hat is recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.”⁹⁹

Additionally, the court in *Diamond* explicitly acknowledged that computers can record “digital music recordings,” saying, “[t]he legislative history thus expressly recognizes that computers (and other devices) have recording functions capable of recording digital music recordings.”¹⁰⁰ Therefore, by following the *Diamond* road-map, it is apparent that a computer could be defined as a “digital audio recording device” because it is able to reproduce directly from a “digital music recording.”

This shows that the second reason given by the *Napster* court as to why the

94. *Id.*

95. *Id.*

96. *Id.*

97. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001). The parties making the claim that a device is a “digital audio recording device” in *Diamond* and *Napster* are opposite. In *Diamond*, the RIAA is the plaintiff seeking to show that defendant’s product (the Rio) is a “digital audio recording device” while in *Napster*, the RIAA is the plaintiff, arguing against Napster’s claim that a computer is a “digital audio recording device.”

98. *Diamond*, 180 F.3d at 1076.

99. *Id.* at 1077 (quoting S. Rep. No. 102-294, at 118-19 (1992)).

100. *Id.* at 1078.

AHRA defense did not apply to Napster users is potentially flawed. At *no* point in *Diamond* did the court conclude that “computers do not make ‘digital music recordings’ as defined by the Audio Home Recording Act.”¹⁰¹ The court in *Diamond* determined that the Rio did not make “digital music recordings,” and that *computers* (and their hard drives) *were not* digital music recordings.¹⁰² The court did *not* comment on whether a *computer* could make a “digital music recording,” likely because it most obviously can.¹⁰³

It must be noted that the court in *Diamond* did state that computers are not digital audio recording devices.¹⁰⁴ However, the court reached this conclusion based on the same logic the *Napster* court used in its first reason: because a computer’s “primary purpose” is not to make digital audio copied records. While an examination of this conclusion will be conducted next, it is important to note that by following the exact same analysis performed by the *Diamond* court regarding the Rio, a computer would be considered a digital audio recording device.

c. The problem with the Napster court’s first reason for why the AHRA did not apply to Napster users.—The court in *Napster* held that “[u]nder the plain meaning of the Act’s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.”¹⁰⁵ At first glance, this reason seems like a tough one for a defendant to overcome because it reflects the AHRA accurately and is logical. One then wonders why the court felt it necessary to throw in another, seemingly incorrect, reason to buttress something that seems ironclad.

The legislative history shows that at the time of the Act’s passing in 1992, “a personal computer’s ‘recording function [was] designed and marketed primarily for the recording of data and computer programs.’”¹⁰⁶ Upon analyzing the holding in *Diamond*, it becomes apparent that the reason computers were not considered “digital audio recording devices” was because the computer industry and its lobbyists would have bitterly opposed its being classified as such.¹⁰⁷ The opposition stemmed from the fact that the computer industry did not want to equip their computers with a SCMS or pay royalties to the RIAA,¹⁰⁸ although this has nothing to do with “the Act’s main purpose—the facilitation of personal use.”¹⁰⁹

If the stated goal of the Act is to allow consumers to record copyrighted music for their own non-commercial use, excluding a computer as a means to

101. *Napster*, 239 F.3d at 1024.

102. *Diamond*, 180 F.3d at 1076.

103. *Id.* at 1077.

104. *Id.* at 1078.

105. *Napster*, 239 F.3d at 1024 (quoting *Diamond*, 180 F.3d at 1078).

106. *Diamond*, 180 F. Supp. at 1078 (quoting S. Rep. No. 102-294, at 122 (1992)).

107. *See id.* at 1078 n.6.

108. *See id.*

109. *Id.* at 1079.

make recordings is asinine and highly implausible. Technology surrounding peer-to-peer systems has advanced considerably since the passing of the Act in 1992 and it is hard to conceive of a means of making a reproduction of copyrighted music that does not involve a computer as a “digital audio recording device.” Today, it can easily be assumed that the device most often used to make a copy of a “digital music recording” is the computer, whether it be from a peer-to-peer system or from copying already owned CDs into MP3 format in order to make a “Greatest Hits” or “Favorites” disc. As one commentator noted, “[the Napster] case clearly illustrates that the AHRA was not designed with the flexibility that is required for the regulation of modern technology.”¹¹⁰ In holding that the Act does not include computers as “digital audio recording devices,” a court could not rationally say that it is attempting to meet Congress’s stated goal of allowing consumers to record copyrighted music for private non-commercial use.

d. So what does this technological lingo all mean?—First, the court in *Napster* listed two reasons why the AHRA did not apply to direct infringers. The second reason was thoroughly inconsistent with the source it was directly cited from and was completely flawed. By following the exact same analysis done by the court in *Diamond* using the Rio as the purported “digital audio recording device,” it is apparent that a computer can make a “digital music recording” and for this reason alone it should be considered a “digital audio recording device.” The first reason given in the *Napster* decision, that computers are not “digital audio recording devices” because their primary purpose is not to make digital audio copied recordings, was determined by the court in *Diamond* to be a product of legislative negotiations and compromises between the computer industry and other involved industries.¹¹¹ This was done so computer manufacturers and distributors would not have to comply with the SCMS requirements or pay royalties to the RIAA.¹¹² However, the role computers play in 2004 is much more substantial than it was twelve years ago when AHRA was passed. To not include computers (and their hard drives) within the definition of a “digital audio recording device” runs contrary to the stated goal of allowing consumers to make recordings of copyrighted music for their private non-commercial use. Therefore, a judge or jury presented with these arguments could easily determine that a user accused of direct infringement was protected by the AHRA.

V. DIRECT INFRINGERS THAT ARE NOT SO DIRECT: CHILDREN AND THEIR PARENTS

The first round of lawsuits filed by the RIAA was highly publicized and criticized for a few reasons. The first reason the suits received such attention, as discussed earlier, was that they were relatively unexpected. Secondly, in the

110. Brian Leubitz, Note, *Digital Millennium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417, 433 (2003).

111. *Diamond*, 180 F.3d at 1078 n.6.

112. *Id.* at 1078-79.

days following the filing of the suits, it became apparent that some were filed against children, while others were filed against individuals who had no access to the software programs required to download or upload the material they were accused of copying. As well as arousing public ire, the suits raised interesting legal questions regarding the liability of children and their parents.

No individual lawsuit filed by the RIAA was as publicized as the one filed against Brianna LaHara. At the time, Brianna was a twelve-year-old honors student from New York.¹¹³ Ultimately, her mother settled the suit for \$2000 along with an apology from Brianna.¹¹⁴ Many of the users of such file-sharing technology are minors and the RIAA seemed prepared to hear excuses from parents named as defendants asserting that their children were responsible for any downloading that took place. As Cary Sherman of the RIAA, said “[w]e expect to hear people say, ‘Well, it wasn’t me, it was my kid.’ Well, if they prefer that the lawsuit be amended to name the kid, we can certainly do that.”¹¹⁵ Whether a parent is sued for his or her child’s downloading or a child is named directly, there is sparse legal authority regarding parental responsibility for a child’s copyright infringement or enforceability against the parent in the event a judgment is rendered against his or her child.

A. Parental Liability

If a parent was named as a defendant and was not liable as a direct infringer (because the downloading was done by his or her child) the RIAA would likely try to hold the parent liable using either the vicarious or contributory infringement doctrines. Again, to establish a contributory infringement claim in the context of copyright law, a plaintiff must show direct infringement by the user and that the defendant had knowledge of the infringement and induced, caused or materially contributed to it.¹¹⁶ To establish a vicarious liability claim, the plaintiff must show that the defendant had the right and ability to supervise the user’s infringing conduct and had a direct financial interest in it.¹¹⁷

1. *Contributory Infringement.*—The most obvious, and perhaps strongest, argument that a parent could make in response to a claim he or she was a contributory infringer is that he or she had no knowledge the activity was taking place. This argument will likely be very case-specific and fact sensitive. Certainly, when the parent has no extraordinary computer expertise, a strong argument could be made that he or she had no knowledge of the child’s infringement.

Even if a parent was shown to have knowledge of the child’s infringement,

113. Alex Veiga, *Labels Try to Hold Parents Accountable*, AP ONLINE, Sept. 12, 2003, available at 2003 WL 63461561.

114. *Id.*

115. Monty Phan, *Facing the Music in Piracy Lawsuit*, NEWSDAY, Sept. 10, 2003, available at 2003 WL 62868652.

116. *A&M Records Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000).

117. *Id.* at 920.

the RIAA would still have to show that the parent either induced, caused, or materially contributed to it. It would be difficult for the RIAA to show that a parent induced or caused their child's infringement absent a confession admitting as much. However, the key question would still remain. Did the parent materially contribute to the infringement? "[T]he material contribution requirement can be satisfied merely by providing the 'site and facilities for known infringing activity.'"¹¹⁸ It would appear that a parent providing a computer and Internet access to his or her child would be providing the site and facilities for infringement. However, as has been noted, that conclusion could be hard to reach considering computers and the Internet have many significant non-infringing uses.¹¹⁹

Assuming a child used a parent's computer at home, it is likely that the material contribution requirement would be met. Therefore, the threshold issue under the contributory infringement doctrine would likely be whether the parent had knowledge of the infringing activity.

2. *Vicarious Infringement*.—It is likely that a judge or jury would find that a parent had the right or ability to supervise his or her child in the parent's own home. Undoubtedly, the RIAA would point to its numerous efforts in warning the public about the illegality of downloading music as evidence that parents have notice of such activity. "Several cases suggest, however, that there is no affirmative duty to police potential infringers, at least absent actual knowledge of the infringing activities."¹²⁰

The RIAA would have a much tougher time showing that the parent had a direct financial interest in, or financially benefited from, his or her child's infringement. Although the RIAA could argue that a parent saved money from not having to buy the music that the child downloaded, this would be tough to prove because it is exceedingly hypothetical. It would have to be assumed that if a child conveyed his musical choice to his parent, the parent would have bought it for him. The author of this Note does not recall a time that his parents waited, with a pen and paper in hand, for him to tell them what new CDs he wanted, just so they could run to the nearest music store and buy them for him.

Although it appears likely that a parent would be shown to have the ability to supervise his or her child's downloading activity, "[t]he direct financial interest part of it is pretty hard to meet, if it's not clear the parent is gaining anything."¹²¹

118. Memorandum from Mark Zuckerman & Devon Bush, Berkman Center for Internet & Society, to the Electronic Frontier Foundation (Oct. 24, 2003) (on file with the Indiana Law Review) [hereinafter Zuckerman & Bush] (quoting *Fonovisa v. Cherry Auction*, 76 F.3d 259, 264 (9th Cir. 1996)). Zuckerman and Bush, from the Berkman Center for Internet and Society at Harvard Law School, prepared a memorandum for the Electronic Frontier Foundation (EFF) regarding parental liability and enforceability against minors that was posted on the EFF website.

119. *See id.*

120. *Id.* (citing *Adobe Sys. Inc. v. Canus Prods.*, 173 F. Supp. 2d 1044, 1054-55 (C.D. Cal. 2001); *Artists Music v. Reed*, 31 U.S.P.Q. 2d 1623 (S.D.N.Y. 1994)).

121. Veiga, *supra* note 113.

B. Enforceability Against Parents

Yet again, there is sparse legal authority regarding whether parents can have their assets attached due to a judgment against their child.¹²² Most likely, any state statutes regarding liability of a parent for his or her child's illegal downloading will be preempted by federal copyright law, either under the U.S. Constitution or section 301 of the Copyright Act.¹²³ "For a state common law or statutory claim to be preempted, the subject matter must be within the scope of the subject of the copyright law, and the claims must be equivalent to the exclusive rights set out in the Act."¹²⁴ Any recordings made before February 15, 1972, are not subject to the Copyright Act preemption provision, but it is unlikely that many children were downloading pre-1972 music. In the event that a child did download pre-1972 music, "the question . . . is whether the claims potentially pursued by the RIAA under state civil laws are equivalent to those within the ambit of the Copyright Act."¹²⁵ For the most part, it is likely that the state claims would be preempted.¹²⁶

In the event that the claims are not preempted, state statutory law or common law will apply. "Parental liability statutes . . . create liability based on damage the child has done to 'property.'"¹²⁷ Most state statutes have a cap on damages that can be recovered from the parent.¹²⁸ The interpretation of what activity constitutes a single tort would then be a highly contested issue. The RIAA would likely contend that the downloading of each song was a separate tort while the defendant would argue the activity as a whole was a single tort. Surprisingly, there is a case that deals with the issue in a comparable factual scenario. In *Thrifty-Tel, Inc. v. Bezenek*, the court held two parents liable for the computer hacking activity of their teenage sons and their friends.¹²⁹ The children hacked into a long-distance provider's computer network in order to make free long-

122. However, "a creditor cannot 'reach . . . assets in which the judgment debtor has no interest.' . . . since a creditor merely 'stand[s] in the shoes of the judgment debtor in relation to any debt owed him or property interest he may own.'" Zuckerman & Bush, *supra* note 118 (citing *Bass v. Bass*, 528 N.Y.S.2d 558, 561 (1st Dep't 1988), as quoted in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002)).

123. 17 U.S.C. § 301 (2000).

124. Zuckerman & Bush, *supra* note 118.

125. *Id.*

126. "Since claims based on harm caused by file sharing would appear to result exclusively from infringement of the copyrights, the argument for preemption is strong." *Id.* (citing *Murray Hill Publ'ns, Inc. v. ABC Communications, Inc.*, 264 F.3d 622 (6th Cir. 2001) (preempting state conversion claim); *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir. 1995) (preempting multiple state claims based on copying, distributing and performing plaintiff's music)).

127. *Id.* (citing CAL. CIVIL CODE § 1714.1(a) (2003)). See also IND. CODE § 34-31-4-1 (1999).

128. See CAL. CIVIL CODE § 1714.1(a) (2003) (capped at \$25,000 per tort); IND. CODE § 34-31-4-1 (capped at \$5000 per tort).

129. 54 Cal. Rptr. 2d 468, 477 (4th Dist. 1996).

distance phone calls. Although the court found the parents liable for their sons' actions (because the conduct occurred in the parent's home and the children knew what they were doing was wrong) and even for the actions of their sons' friends, it held that the multiple hackings only constituted a single tort.¹³⁰ Additionally,

[i]t should be noted that the court refused to allow the long distance provider to apply the damages specified in the company's "unauthorized use" portion of its service agreement, but insisted on actual damages. This could be used as precedent indicating that parents would only be liable for actual damages, not statutory damages, of their child's infringing behavior.¹³¹

If a state has no statute regarding damages imposed on a parent due to the actions of his or her child, common law liability could be imposed. Usually, however, a parent will not be liable for the torts of his minor child.¹³²

Again, in the event that a state claim is not preempted by section 301 of the Copyright Act, it is likely that most states will have a per statutory tort damage cap and at least one similar case has ruled that the computer activity as a whole was a single tort.

VI. SOLUTIONS TO THE CONFLICT

The effect that the recent lawsuits filed by the RIAA will have on online downloading activity remains to be seen. Not only is it beyond the scope of this Note, it is primarily a sociological issue rather than a legal one. However, it is safe to say that the lawsuits will not end the conflict between copyright holders and consumers. Although many different solutions have been proposed to end or subdue this conflict, most, if not all, of them forget, ignore, or downplay the most obvious and important factor: the ability of consumers to download music from the Internet does not appear to be going away anytime soon, if ever. By examining some of these proposed solutions, it becomes apparent that the best solution is one that will involve a simple—if there is such a thing—royalty system.

A. Legislation

There have been recent attempts by Congress to pass legislation purporting to protect copyrighted digital works. Specifically, the Hollings Bill¹³³ and the

130. *Id.* at 477.

131. Zuckerman & Bush, *supra* note 118, at n.42.

132. *Id.* (citing *Van Den Eikhof v. Hocker*, 151 Cal. Rptr. 456 (Ct. App. 1978); *McCarthy v. Heiselman*, 125 N.Y.S. 13 (App. Div. 1910)).

133. Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

Berman Bill¹³⁴ were both introduced before dying in the 107th Congress.¹³⁵ The Hollings Bill would have, “made the sale, offer of sale, or transport in interstate commerce of any digital media device unlawful, unless the device ‘include[d] and utilize[d] standard security technologies that adhere[d] to the security system standards adopted’ under the bill.”¹³⁶ It failed because, “it placed an unfair burden on the technology sector, was not a complete solution for content owners . . . and did not provide sufficient exceptions for fair use.”¹³⁷ The Berman Bill basically allowed copyright holders to hunt down unauthorized users, hack into their computers and disable or impair the mechanisms used to do the unauthorized activity.¹³⁸ The Bill essentially immunized copyright holders for any damage they caused on the user’s computer that resulted in less than \$250.00.¹³⁹ Although there have been many valid criticisms leveled against this piece of legislation, none are more obvious than those focusing on an individual’s right to privacy.

Looking at only these two proposed bills, it becomes apparent that drafting legislation regarding copyrighted material online is increasingly futile. It is virtually impossible to draft a piece of legislation that will satisfy each of the affected parties in this conflict. In the rare instance where legislation appears to do just that, it will likely be wholly or partially irrelevant in a few years—or even months—when the next “new” technology comes along rendering past statutory language obsolete. “Modern Internet technology has an incredible ability to adapt to changes in market conditions; for examples, one can look at broadband, the MP3 file format, or the current generation of file-sharing services.”¹⁴⁰ Legislation based on Internet technology that is used today would likely be of little value and a waste of time and resources. Furthermore, an attempt by Congress to look into a crystal ball to predict future technological shifts will either be so vague as to have no substantive value or will be overly burdensome like the Berman Bill.

In short, legislation is not the answer to the conflict between the music industry and consumers as it does little—if anything—to stop the fact that file-sharing technology exists and will continue to exist in the foreseeable future.

B. Technology and Copy Protection

As mentioned in Part I of this Note, the music industry has also attempted to protect its copyrighted material through the use of technology. For primarily the same reasons that legislation will not bring an end to this conflict, it is likely that

134. H.R. 5211, 107th Cong. pmb. (2002).

135. Norman, *supra* note 4, at 396-97.

136. *Id.* at 397 (quoting Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. § 5(a) (2002)).

137. *Id.* at 398.

138. H.R. 5211, 107th Cong. pmb. (2002).

139. *Id.*

140. Leubitz, *supra* note 110, at 433.

the use of copy protection or other such technology will fail in this regard. One commentator has noted a few problems with the music industry's copy protection attempts: high consumer dissatisfaction; potential invasion of privacy concerns; and most importantly, the possibility of technological circumvention.¹⁴¹ Just as technology is too fast for legislation, it is also too fast for protection. If our short computer history teaches us anything, it is that "hackers" and others will likely get around most copy protection devices.

It has happened time and time again: simply witness the ill-fated attempt of the music industry to develop copy-protected discs. A crack . . . was quickly discovered and rendered the protection technology wholly ineffective. By drawing a thick line around the outer edge of a copy-protected CD with a felt-tipped pen, CDs can be copied, despite the music industry's best efforts.¹⁴²

Although the DRM technology is innovative and it is possible that the industry could begin to lean more heavily on it, it is also capable of being circumvented. "If history is any indication, it is unlikely that any DRM technologies will ever completely eliminate illegal reproduction of copyrighted works."¹⁴³ Although as one author noted, the goal of the DRM technology is not to eliminate all illegal song downloading, but rather, "if [the] deterrent effect is great enough to substantially decrease the number of illegal copies that replace legal sales of the work, the copy protection has successfully eliminated the largest threat to the copyright owner."¹⁴⁴ If the music industry could come together and use the same method of DRM technology, it is possible that it would provide a staunch defense against copyright infringement. However, it does not seem logistically probable that this will occur anytime soon, and in the event that it does, it is likely that hackers and others could get around the technology in little time.

C. "New" Napster Models

There are quite a few online sites that offer fee-based subscription services. The plans vary but offer essentially the same thing: copyrighted songs available to download. Most allow the song to be played only on the computer used to download it, although some services let the user purchase portable downloads

141. Jensen, *supra* note 17, at 253-54.

142. John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 80 (2003) (citing *CD Crack: Magic Marker Indeed*, at <http://www.wired.com/news/technology/0,128252665,00.html> (May 20, 2002)).

143. James S. Humphrey, Note, *Debating the Proposed Peer-to-Peer Piracy Prevention Act: Should Copyright Owners Be Permitted to Disrupt Illegal File Trading Over Peer-to-Peer Networks?*, 4 N.C.J.L. & TECH. 375, 410 (2003).

144. *Id.* (citing Stan Liebowitz, *Policing Pirates in the Networked Age*, 438 POL'Y ANALYSIS 1, 1 (2002), available at <http://www.cato.org/pubs/pas/pa-438es.html>). See also Jacover, *supra* note 4, at 2247-48.

that allow the transfer of songs to a CD or other device.¹⁴⁵ However, a problem with most, if not all, of these services is that, “none of the current business models are offering enough content, none are easy to subscribe to, and consumers do not perceive the value in the content that is being delivered.”¹⁴⁶ Although some observers have argued that these services have shown signs of success, others have disagreed.¹⁴⁷ Although a service could see some success if it partnered with any or all of the major five record companies and offered songs for a fairly cheap price, it is unlikely that this will occur anytime soon. The main reason for this is the parallel existence of the same material being offered for free, with no hassles, at similar web-sites. Right now, it is understandably difficult to persuade consumers to pay to join the services available—that do not have much selection—when they can get what they want for free. Although the deterrent effect of the recent suits filed by the RIAA is unknown, it is safe to say that they have not eliminated downloading activity completely. Accordingly, it is unlikely that services requiring payment for subscriptions will succeed due to the concurrent availability of free sites.

D. Compulsory Licensing

Many commentators have suggested that the best way to solve this apparent conflict is through the use of compulsory licensing. “Under a compulsory licensing scheme, all copyright owners would be required by law to license their content on a non-discriminatory basis, at a regulated rate, to any potential distributor who met certain baseline requirements. This would effectively replace property rules . . . with liability rules.”¹⁴⁸ “To compensate copyright holders, royalties would be collected from various entities that use copyrighted material and then distributed to copyright holders. This scheme would operate much like performance rights societies, only on a much larger scale.”¹⁴⁹ The main problem with a compulsory licensing scheme is that it would require the tracking of downloading songs in an extensive and precise manner. Besides the

145. Humphrey, *supra* note 143, at 403-04.

146. *Id.* at 404. Humphrey notes that one service, eMusic, offers “an unlimited number of downloads that can be kept forever and transferred to CDs.” *Id.* However, eMusic has not gotten any of the five major record companies to join. Therefore, although the service meets consumer’s portability expectations, there is little content available that consumers want.

147. See Tehranian, *supra* note 142, at 63 n.68 (citing Jon Healey, *Napster Service to be Revived by Year-End*, L.A. TIMES, July 28, 2003, at C1 (noting the success of Apple’s iTunes service, which has sold 6.5 million copies in its first two and one-half months of existence); Ciaran Tannam, *iTunes Sales Continue to Fall*, slyck.com (July 30, 2003), available at <http://www.slyck.com/news.php?story=208> (noting that week by week sales on iTunes have been declining and that the success of iTunes may have been exaggerated)).

148. Fagin et al., *supra* note 7, at 524.

149. Jacover, *supra* note 4, at 2251 (citing Alan R. Kabat, *Proposal for a Worldwide Internet Collecting Society: Mark Twain and Samuel Johnson Licenses*, 45 J. COPYRIGHT SOC’Y U.S.A. 329, 331-33 (1998)).

fact that this daunting task would have to be forced upon someone, there is certainly no guarantee that the tracking methods used to determine who owes royalties would not be compromised. Whether watermarking or another technological device is used, there is currently no sound way to protect any tracking system from hackers and others.

E. Tax-Royalty System

The author of this Note believes that the best solution is to institute a tax administered through either a government copyright agency or other similar entity. "Under this system, music on the Internet could be distributed at will, without fear of litigation or license payments to copyright holders."¹⁵⁰ One commentator has suggested taxing "[e]very entity that derives a financial benefit from the use of music on the Internet."¹⁵¹ This approach seems over-inclusive, burdensome, and is ultimately unnecessary. The only entities that should be taxed are ISPs. This tax will ultimately be passed on to the consumer, reflected in higher service charges or monthly billing statements. Essentially, the public will be paying the record companies to download their copyrighted material, which, if done correctly, could satisfy both. The amount that would need to be charged to the ISPs would have to be enough to reasonably accommodate the record industry as well as the ISPs for their collection services. One author suggested a one dollar monthly charge per ISP subscriber.¹⁵² Assuming that there are fifty million Internet users in the United States, this would equal \$600 million generated annually. Obviously, studies would need to be done and data would need to be collected to arrive at a figure that would compensate the music industry fairly, without gouging consumers.¹⁵³

Lemley additionally encouraged the simultaneous creation of legislation that would "criminalize software that carries the potential of mass distribution of copyrighted works."¹⁵⁴ Additionally, Lemley's proposed legislation would authorize criminal sanctions to be imposed upon individuals that possess any "decentralized P2P software already available to consumers."¹⁵⁵ The stated goal of this proposed legislation would be to "initiate a containment of available piracy software."¹⁵⁶ However, the point of having a tax system in place would be to get both the music industry and consumers what they want. Surely the

150. *Id.* at 2252-53.

151. *Id.* at 2253.

152. Kevin Michael Lemley, Comment, *Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 645-46 (2003).

153. As it was the author's mistaken understanding upon enrolling in law school that there would be no math, the author of this Note will not offer any wild speculation on what an agreeable tax amount should be.

154. Lemley, *supra* note 152, at 638.

155. *Id.* at 641.

156. *Id.* at 638.

public would not support legislation that authorizes criminal sanctions for downloading music. Many criminal court systems in this country are already at full capacity and asking them—along with law enforcement agencies—to begin devoting an astronomical amount of time and resources chasing down individuals who download music from Internet services is impracticable at best. As one commentator noted, “[criminal sanctions would] incur heavy political and economic costs on the enforcement authorities and would ultimately become ineffective when the authorities lose interest in enforcing those penalties. Even worse, this lack of enforcement might instill in the public a lack of confidence in and respect for the legal system.”¹⁵⁷

Obviously, the music industry does not want to lose control over its copyright protected material on the Internet. However, a royalty system could ensure that the industry receives a substantial amount of compensation for the use of the material. Additionally, the music industry could alter its business model to incorporate strategies such as windowing to enhance CD sales. “A windowing strategy involves the public release of media through several different channels over a carefully sequenced time period. In the film industry, this involves releasing theatrical films to video, pay-per-view, pay cable, and then finally broadcast TV.”¹⁵⁸ This would allow consumers to purchase an artist’s CD at different times and for different prices. Also, it seems that the music industry is finally learning that including items along with the CDs will enhance sales as well. Dedicated music fans will still buy CDs, as many consumers will always prefer having their favorite artists “new” songs in front of them without having to spend time downloading each song individually.

The fact of the matter is that there are millions of consumers today who download copyrighted music from Internet related services without paying anything for it. Legislation in and of itself will not correct this situation because the process is outpaced by technological advances. Similarly, copy protection devices employed by the music industry have been simple to circumvent and raise serious privacy issues. Subscription sites that charge consumers to download song-files have not received the support of the music industry’s major players, primarily due to the fact that there is nothing to stop individuals from downloading for free. Compulsory licensing schemes could turn into a logistical nightmare and do not offer safety from hackers and others. Instituting a tax scheme is the simplest way to alleviate this conflict. A monthly per-subscriber tax placed on ISPs will be passed on to consumers and the system as a whole will remain untouched. As well as being the most simplistic way to solve this conflict, a tax scheme would ideally give both the music industry and consumers what they want.

157. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 403 (2003).

158. Humphrey, *supra* note 143, at 406 (citing G. Krishan Bhatia et al., *Windows into the Future: How Lessons from Hollywood Will Shape the Music Industry*, Booz-Allen & Hamilton e-Insights 3 (June 2001), at http://www.bah.de/content/downloads/insights/5J_Windowsi.pdf).

CONCLUSION

It is very likely that most of the recent lawsuits filed by the RIAA against individuals accused of illegally downloading copyrighted material will be settled long before trial. In the event that some do make it to the trial stage, it is likely that defenses based on the fair use doctrine and the AHRA will be used. It will be interesting to see how long it takes before another technological advancement brings about an entirely different conflict, leaving thoughts of this one in the dust. In the mean time, it appears that taxing ISPs directly will be the most effective way to alleviate the conflict between the music industry and consumers.

THE END OF TIME FOR EQUAL TIME?: REVEALING THE STATUTORY MYTH OF FAIR ELECTION COVERAGE

ANNE KRAMER RICCHIUTO*

INTRODUCTION

“The news is whatever I say it is.”¹

For the Federal Communications Commission (“FCC”), newscaster David Brinkley’s once tongue-in-cheek remark is a reality. As the agency charged with enforcement and interpretation of the Communications Act of 1934² (“the Act”), which also authorized its creation, the FCC makes determinations that affect our local and national election coverage. In general, the purpose of the Act was to encourage socially responsible use of the airwaves by broadcasters, who were viewed as the gatekeepers of this very valuable resource.³

Section (a) of the Act contains the “equal time rule,” which requires that stations that permit candidates to appear on their airwaves must allow opposing candidates the same privilege.⁴ Originally, the rule stopped there. However, in 1959, in response to an FCC ruling that candidate appearances on news programs would trigger the equal time requirements of the Act,⁵ Congress created four explicit exemptions from equal time for news-oriented broadcasts focusing on political candidates. These exceptions included:

- (1) bona fide newscast[s],
- (2) bona fide news interview[s],

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1. Alberto Bernabe Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas*, 67 REV. JUR. U.P.R. 447, 458 (1998) (citing Ford Rowan, *News Media Responsibility—A Program for Improvement*, 17 WILLAMETTE L. REV. 231, 231 (1980)).

2. 47 U.S.C. § 315 (2000). One judge has suggested that provisions in § 315(e) of the Act requiring broadcast licensees to collect and publicly disclose records of requests for air time for political advertisements are unconstitutional. *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 374-75 (D.D.C. 2003) (Henderson, J., concurring). However, the Supreme Court disagreed with this contention, finding that § 315(e) does not violate the First Amendment. *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 639-40 (2003). Further, this Note deals exclusively with § 315(a) of the Act.

3. Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 528-29 (1996) (discussing potential FCC strategies to ensure that broadcasters are operating in the public interest).

4. “If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .” 47 U.S.C. § 315(a).

5. CBS, Inc., 26 F.C.C. 715, 742-43 (1959).

- (3) bona fide news documentar[ies] (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), [and]
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).⁶

The exceptions were enacted to “make it possible to cover the political news to the fullest degree,”⁷ and to “preserv[e] licensees’ traditional independent journalistic judgment.”⁸ Since the creation of these exemptions, the FCC has reviewed many requests from various media outlets to determine whether certain programs constitute “bona fide news” as described in the four categories and are therefore exempted from equal time requirements.

Most recently, the FCC considered and granted an exemption to Infinity Broadcasting Operations, Inc., broadcaster of *The Howard Stern Show*, finding that Stern’s radio program met the requirements of a bona fide news interview program.⁹ In so doing, the FCC followed several similar rulings that exempted non-traditional news shows, effectively whittling away at the applicability of the doctrine.

The trend created by these rulings highlights a conflict created by the equal time rule. Clearly, as more shows are exempted, fewer have to comply with equal time and unequal media coverage for candidates multiplies. Allowing the FCC, as an administrative body, to make value judgments when applying the exemptions created by Congress does and will continue to result in anomalous outcomes regarding the exemptions.

By reviewing various decisions of the FCC and federal courts, this Note addresses the current state and the apparent demise of the equal time rule. Part I discusses the history and the contents of the Communications Act. Part II reviews and compares the various interpretations and criticisms of the equal time provisions of the Act by the FCC, the courts, and commentators. Part III explores how those interpretations have resulted in numerous exceptions and loopholes far beyond those explicitly stated in the statute and Part IV advances suggestions about the preservation or abrogation of the doctrine. Ultimately, this Note concludes that in its current state, the equal time rule is little more than an administrative burden on both the FCC and media lawyers, and should either be abandoned or radically overhauled to meet the modern challenges posed by the

6. 47 U.S.C. § 315(a)(1)-(4).

7. Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1498 (1986) (quoting 105 Cong. Rec. 14,451 (1959) (remarks of Sen. Holland); see *id.* at 1493-94 (discussing constitutional challenges to reasonable access and equal time and concluding that neither “threaten so substantial a chill on political speech as to warrant invalidation,” but that the availability of electronic media has diminished the *compelling* need for equal time) (emphasis added)).

8. *Id.* (quoting Kennedy for President Comm. v. FCC, 636 F.2d 417, 424 (D.C. Cir. 1980)).

9. Infinity Broad. Operations Inc., 18 F.C.C.R. 18603, 18604 (2003).

abundance of media outlets in today's society.

I. THE ACT

A. *A Brief History of the Act*

Historically, all broadcast regulation has been motivated by a "scarcity of the frequencies" theory.¹⁰ Although the merits of this rationale are debated,¹¹ the idea that "the radio spectrum simply is not large enough to accommodate everybody"¹² is responsible for the notion that at least some regulation is necessary to ensure fair use of this limited and valuable public resource. Since broadcast frequencies are scarce, those who control access to them are viewed as being responsible for what those who are not in control get to see and hear. This notion "that the [broadcast] licensee should operate as public trustee explains much of the panoply of regulations to which . . . broadcasters were subject . . . from approximately the end of World War II until very recent times."¹³

One major area of regulation resulting from the scarcity doctrine is election coverage. As an initial matter, there is no common law duty of a television broadcaster to treat all political candidates alike, nor a right of candidates to be treated alike.¹⁴ Rather, the rights and obligations of both broadcasters and the public have been created by statute. The regulations of section 315(a) of the Act originated in section 18 of the Radio Act of 1927,¹⁵ which was intended to promote cooperation between public use and private control of broadcasting.¹⁶

10. Joel Rosenbloom, *The "Vast Wasteland" in Retrospect*, 55 FED. COMM. L.J. 571, 571-75 (2003) (discussing origins of the scarcity theory and noting that though it seems antique it has not yet been discredited).

11. William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 294-95 (1997) (outlining the "numerous problems with the scarcity rationale . . . not the least of which is the lack of scarcity").

12. *NBC, Inc. v. United States*, 319 U.S. 190, 213 (1943).

13. THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 147 (2d ed. 1998).

14. *Crommelin v. Capitol Broad. Co.*, 195 So.2d 524, 526 (Ala. 1967) (denying fraud action against broadcaster since there was no violation of any legal or equitable duty).

15.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect

....

Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, 1166 (Feb. 23, 1927) (repealed July 16, 1947).

16. Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-line Computer Services*, 38 VILL. L. REV. 517, 538 (1993) (citing *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 104-05 (1973)).

Because the media was viewed as essential to distributing information and promoting political thought, Congress sought to limit private control of broadcasting that would permit censorship of opposing views, leaving citizens uninformed.¹⁷

Congress decided to revise the specifics of the equal time provision in 1959 in response to FCC rulings "requiring equal opportunity for rivals of incumbents whose activities had been the subject of routine news reporting."¹⁸ Rejecting a proposal that would have characterized broadcasters as common carriers who were *required* to allow public access to the airwaves, Congress limited the equal opportunities obligation to apply only when other political candidates had already been permitted access to the station.¹⁹ Though the four statutory exemptions created the risk that broadcasters could abuse them to promote favored candidates during election coverage, Congress concluded that "[t]he public benefits [of dynamic coverage of political campaigns] are so great that they outweigh [sic] the risk that may result from the favoritism that may be shown by some partisan broadcasters."²⁰ The exceptions were intended to "strike a balance between general interests in an informed public and more particularized concern with the accrual of special advantage or influence in the course of a political campaign."²¹ The FCC "made clear during the legislative hearings that it preferred a bill which would enable it to define the exempt categories without reference to broadcaster's motives, and to decide any cases solely by determining whether the program fell within its definition."²² However, the legislative history also indicates Congress' intent that "a program not be entitled to the exemption if it can be shown that the primary purpose of the broadcaster was other than the dissemination of news."²³ Thus, it is clear that in the early years of the exceptions, Congress intended them to enhance election coverage and maximize the information received by the public. However, as this Note will discuss in Parts III and IV, it is questionable whether the exceptions have actually helped broadcasters fulfill this goal.

Congress suspended the equal time requirements in 1960 to permit the nation's first televised presidential debates.²⁴ Because the exceptions were less

17. *Id.*

18. DONALD E. LIVELY, *ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW* 238 (1992).

19. Campbell, *supra* note 16, at 538-39.

20. Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 *FED. COMM. L.J.* 687, 695 (2000) (quoting S. Rep. No. 86-562, at 10 (1959)) (examining constitutional issues raised by *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), wherein the Supreme Court held that exclusion of a third party candidate from a debate was not a First Amendment violation).

21. LIVELY, *supra* note 18, at 238.

22. Recent Statute, *Federal Communications Act—Amendment Exempts Certain News Programs from Equal-Time Provisions*, 73 *HARV. L. REV.* 794, 795-96 (1960) (announcing statutory revision and noting that "[d]etermining the boundaries of the four excluded categories will be a difficult task for the FCC").

23. *Id.* at 795.

24. Pub. L. No. 86-677, 74 Stat. 554 (Aug. 24, 1960).

than a year old at that point, they had yet to undergo enough interpretation to allow Congress to capitalize on their benefits immediately. The suspension “enable[d] Democratic and Republican Presidential candidates to debate without creating an obligation to provide time to other [candidates].”²⁵ Fifteen years later, the FCC categorically defined debates as “bona fide news events,” that would always be exempted from equal time.²⁶

From 1949 to 1987, the equal time requirement had a counterpart known as the “fairness doctrine,” which provided that broadcasters airing one side of a controversial issue must also provide equal time to opposing viewpoints.²⁷ The FCC ultimately abandoned the fairness doctrine, citing chilling effects on freedom of speech,²⁸ “despite a [1969] Supreme Court decision upholding the doctrine and legislation rushed through Congress . . . to make it an undeniable part of the Communications Act.”²⁹ Some commentators wonder why the equal time rule has not suffered a similar fate.³⁰

In the last several years, the equal time doctrine has virtually stagnated, serving only as a technical hurdle to broadcasters without having much effect on their substantive content or programming decisions. Its effectiveness as a promoter of public information is minimal at best.

B. The Provisions of the Act, Defined

1. “Legally Qualified Candidate”.—In a departure from the deference given

25. Lively, *supra* note 18, at 238.

26. Aspen Inst. Program on Communications and Soc’y, 55 F.C.C.2d 697, para. 21-29 (1975), *aff’d*, 538 F.2d 349 (D.C. Cir. 1976); see Paul B. Matey, *Abundant Media, Viewer Scarcity: A Marketplace Alternative to First Amendment Broadcast Rights and the Regulation of Televised Presidential Debates*, 36 IND. L. REV. 101, 104, 117-18 (2003) (concluding that federal oversight of televised debates is a necessary limit on networks’ First Amendment rights).

27. *Ackerman v. CBS, Inc.*, 301 F. Supp. 628, 632 (S.D.N.Y. 1969) (describing and applying the fairness doctrine).

28. Syracuse Peace Council, 2 F.C.C.R. 5043, para. 98 (1987).

29. WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 89 (1990). One author points out that the 1987 ruling was “just before Limbaugh inaugurated the Age of Rant Radio.” Patt Morrison, *Recent Conservative Outcry Reeks of Liberal Leanings*, L.A. TIMES, Oct. 14, 2003, at B3. That same year, President Reagan vetoed a legislative attempt to codify this doctrine. Robin R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 399-400 (1993). Both Presidents George H.W. and George W. Bush have threatened to veto such legislation should it be presented to them. *Id.*; Katherine Mangu-Ward, *Shut Up, They Explained*, THE WKLY. STANDARD vol. 9 (3) (Sept. 29, 2003).

30. Smith, *supra* note 7, at 1503; Michael C. Dorf, *Why U.S. Law May Keep the Terminator Off the Air Until After Election*, FINDLAW (Aug. 22, 2003), at <http://www.cnn.com/2003/LAW/08/22/findlaw.analysis.dorf.arnold/> (last visited Sept. 29, 2004). One former FCC insider predicts that “Congress, the courts, or the FCC itself under a different administration will resurrect the doctrine.” RAY, *supra* note 29, at 89.

to broadcasters in interpreting other provisions of the Act, "broadcasters are prohibited from exercising their own judgment as to who may be considered legally qualified."³¹ As a general rule, determining whether a person is considered "a legally qualified candidate" depends on the law of the jurisdiction in which the person is running for office.³² To be a legally qualified candidate, a person must have "(1) publicly announced an intention to run for office, (2) [be] qualified by pertinent law to hold the office being sought, or (3) [have] made a substantial showing of being a bona fide candidate" by participating in campaign activities.³³ Write-in candidates who do not meet the requirements for appearing on the ballot may, in addition to the rules of their own jurisdiction, be required to make other showings such as election eligibility and proof of nomination by a commonly known and regarded political party.³⁴

In the case of a recall like California's 2003 gubernatorial election, where the ballot first asks whether the incumbent should be recalled and then who the successor should be, *all* individuals appearing on the ballot, including the incumbent candidate, are considered legally qualified candidates.³⁵ However, the exception does not apply to candidates concurrently running in primaries for different parties because they are not yet considered "opposing" candidates, despite the fact that they are ultimately running for the same office.³⁶

2. "Use".—The determination of whether or not a televised appearance is a "use" under the Act does not depend on whether or not the appearance is political in nature, since even nonpolitical appearances may be considered "uses" under the Act.³⁷ For example, during Ronald Reagan's candidacy for the Republican Party nomination, the FCC determined that televising his movies would constitute a use that would entitle other candidates for the Republican nomination to equal time.³⁸

Initially, "use" was thought to be any appearance in which the candidate was

31. JOHN R. BITTNER, *LAW AND REGULATION OF ELECTRONIC MEDIA* 117 (2d ed.1994).

32. Eleanor Clark French, 40 F.C.C. 417, 418 (1964) (interpreting New York law to determine whether complaining candidate was legally qualified); Rady Davis, 40 F.C.C. 435, 435 (1965) (finding that candidate was not legally qualified since Kentucky election law did not permit write-in candidates).

33. *LIVELY*, *supra* note 18, at 237.

34. Frank J. Kuhn, Jr., 48 F.C.C.2d 433, 433 (1974).

35. Station KOAA-TV, Pueblo, Colo., 68 F.C.C.2d 79, 79-80 (1978) (declaratory holding) (holding, in case of first impression, that though recalls are generally not contemplated by the Act, when they include the question of who should replace the officeholder (if recalled) the incumbent would be disadvantaged if not considered a legally qualified candidate).

36. *KWFT, Inc.*, 43 F.C.C. 284, 284 (1948) (holding that "while both primary . . . and general elections are comprehended within the terms of Section 315, such elections must be considered independently of one another and equal opportunities . . . need only be afforded to legally qualified candidates for the same office at the same election").

37. *Paulsen v. FCC*, 491 F.2d 887, 891 (9th Cir. 1974).

38. *Adrien Weiss*, 58 F.C.C.2d 342, 342 (1976).

identifiable to the audience, even if he did not speak.³⁹ However, in 1991, the FCC re-examined that interpretation, and instead concluded that some degree of intent to “use” the media by making an appearance was necessary for the use to trigger equal time.⁴⁰ To reflect that idea, the FCC limited the definition of use to “only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate.”⁴¹ In so doing, the FCC pointed to the fact that the “plain language of the statute suggests the candidates’ tacit approved participation in the broadcast,” and that the “legislative history of Section 18 of the Radio Act . . . indicates that Congress primarily was addressing candidate-initiated appearances and speeches when enacting the equal opportunities requirement.”⁴² Therefore, the current standard for a “use” is “if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities.”⁴³ But if the appearance is involuntary, “such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, [that] appearance would not constitute a use.”⁴⁴

Aside from the candidates’ intention for the appearance, the type and format of the program on which the candidate appears also affects whether or not the appearance is considered a use. The FCC has enumerated the following factors to be considered when determining whether a specific program provides the format for a use: (1) the format, nature, and content of the program; (2) whether the format, nature, or content of the program has changed since its inception, and, if so, in what respects; (3) who initiates the program; (4) who produces and controls the program; (5) when the program was initiated; (6) whether the program is regularly scheduled; and (7) if the program is regularly scheduled, the time and day of the week when it is broadcast.⁴⁵ Appearances on programs that are regularly featured by networks are more likely to be considered “uses” than, for example, a special feature that mentions a candidate for some reason other than his candidacy.

In addition, the duration of the appearance has to be “significant enough to activate the equal opportunity obligation.”⁴⁶ Appearances lasting only a few seconds “have been dismissed as inconsequential and not implicating the terms of the statute.”⁴⁷

3. *The Exceptions.*—“The question of what is a bona fide news program,

39. Nat’l Urban Coalition, 23 F.C.C.2d 123, 123 (1970).

40. Codification of the Comm’n’s Political Programming Policies, 7 F.C.C.R. 678, para. 33 (1991).

41. *Id.*

42. *Id.*

43. *Id.* at para. 34.

44. *Id.*

45. Use of Broad. Facilities by Candidates for Pub. Office, 24 F.C.C.2d 832, sec. III (1970).

46. Lively, *supra* note 18, at 237.

47. *Id.*

however, at a time when news and entertainment are often mixed in the same program is a subject of much debate in the communications industry.”⁴⁸ As evidenced by several recent decisions, this determination remains one that sharply divides those with differing views of the FCC’s proper role in regulating the media. The next portion of this Note clarifies the interpretations of each of the exemptions.

a. Exception 1: Bona fide newscast.—Similar to the determination of what constitutes a “use,” whether a program is considered a bona fide newscast seems to depend as much on its format as on its content. The FCC has stated that its inquiry focuses on a potential newscast’s subject matter, but whether it “report[s] about some area of current events, in a manner similar to more traditional newscasts.”⁴⁹ In relying on this criteria, the FCC is focused less on evaluating the quality or significance of the topics and stories selected, instead relying on good faith news judgment.⁵⁰ Critics argue that the “crossover these days between news shows and entertainment shows . . . is turning equal time into a meaningless irony.”⁵¹ However, one format in which no crossover is allowed is third-party produced newscasts created to promote a particular candidate; those programs are never considered bona fide newscasts.⁵²

b. Exception 2: Bona fide news interview.—The second exception to equal time that Congress created was for bona fide news interviews. In determining when this interview exception applies, the FCC looks to the format of the program on which the interview is aired. In so doing, it considers:

- 1) whether the broadcast is regularly scheduled[,] 2) whether the selection of the content, format, and participants of the program is under the exclusive control of the licensee and 3) whether determinations as to format, content, and participants are made in independent exercise of licensee’s news judgment rather than political advantage of any candidate.⁵³

48. Office of Int’l Info. Programs of U.S. Dep’t of State, *U.S. Radio and TV Stations Required to Give Equal Time*, ISSUES OF DEMOCRACY, Oct. 2000, at 83, available at <http://usinfo.state.gov/journals/itdhr/1000/ijde/cs322.13.htm> (last visited Sept. 29, 2004) [hereinafter ISSUES OF DEMOCRACY].

49. Paramount Pictures Corp., 3 F.C.C.R. 245, para. 7 (1988).

50. *In re Request of Access Hollywood*, 1997 WL 358720 (F.C.C. July 1, 1997).

51. Amy Wilentz, *Getting Along Famously; One Candidate’s White-hot Star Power make this an Election Campaign like no other*, L.A. TIMES, Sept. 28, 2003, at M6.

52. Codification of the Comm’n’s Political Programming Policies, 7 F.C.C.R. 678, para. 29.

53. Ishmael Flory, 66 F.C.C.2d 1047, 1047 (1976). The second circuit applied these factors in 1995, finding that an interview with an undeclared candidate for president where the tenor of the proceedings was as critical as it was flattering, where audience members asked questions in a manner wholly consistent with a typical news interview, and where the host repeatedly pressed the candidate for specifics during a question and answer segment was a bona fide news interview, notwithstanding a claim that network pursued a competitive advantage that compromised its news judgment. *Fulani v. FCC*, 49 F.3d 904, 912-13 (2d Cir. 1995).

Many programs, such as *The Howard Stern Show*,⁵⁴ *Access Hollywood*,⁵⁵ and *Politically Incorrect*,⁵⁶ are exempted in their entirety (rather than merely certain interview segments) under this exception. To be eligible, it is not necessary that program focus exclusively on current events, so long as it features bona fide interviews on a regular basis.⁵⁷ Exempting entire programs rather than individual segments from equal time requirements is one of the factors accounting for the deterioration of equal time. For example, although Howard Stern frequently has guests on his program, arguably the frequency of actual news interviews is fairly limited. However, following the September 2003 ruling, it appears that Stern never again has to comply with any equal time requirements, even if he were to suddenly shift his focus to hard-news, since the format, and not the contents of the program formed the basis of its classification as a bona fide news interview show.

c. Exception 3: Bona fide news documentary.—To determine whether a program falls under this exception, the FCC again looks to a number of factors, including (1) whether the appearance of the candidate was incidental to the presentation of the subject; (2) whether or not the program was designed to aid or advance the candidate's campaign; (3) whether the appearance of the candidate was initiated by the station on the basis of the station's bona fide news judgment that the appearance was in aid of the coverage of the subject matter; and (4) whether the candidate had any control over the format, production, or subject matter of the broadcast.⁵⁸

One common format for candidate appearances—debates—has specifically been found to preclude a program from being designated as a bona fide news documentary.⁵⁹ Therefore, under these factors, a documentary news piece on a specific issue could include various candidates' viewpoints without triggering equal time so long as the primary subject was the issue itself and the station had full control over the content.

d. Exception 4: On the spot coverage of bona fide news events.—This provision is most often applied to candidate press conferences and live coverage of debates. In specifically discussing press conferences, the FCC found that where a station makes a good-faith judgment as to the newsworthiness of the

54. In response to a request for a declaratory ruling by Infinity Broadcasting Operations Inc., the FCC relied on the following facts in determining that the Howard Stern Show is a bona fide news interview program: "the program is regularly scheduled; Infinity, which broadcasts the program, has control over all aspects of the show; Infinity's decisions on format, content, and participants are based on newsworthiness; and guests that happen to be political candidates are not selected to advance their candidacies." Infinity Broad. Operations, Inc., 18 F.C.C.R. 18603 (2003).

55. See *Access Hollywood*, 1997 WL 358720, at para. 5.

56. See *ABC, Inc.*, 15 F.C.C.R. 1355, 1359-60 (1999).

57. See *Multimedia Entm't, Inc.*, 9 F.C.C.R. 2811, 2811 (1994).

58. Declaratory Ruling Concerning Whether the Educ. Program "The Advocates" Is an Exempt Program Under Section 315, 23 F.C.C.2d 462, 462 (1970).

59. *Id.*

event and shows no favoritism toward any candidate, the broadcast of a news conference held by a candidate for public office, including an incumbent, is on the spot coverage.⁶⁰ The main criticism of this exception is that it does not require equal coverage of candidates who are not invited to participate in televised debates.⁶¹

C. Enforcement

Broadcasters are expected to comply with equal time requirements on their own volition. However, in the event of noncompliance, grievance procedures are available.⁶² Generally, a candidate must first make a request for equal time. Next, good-faith negotiations between the candidate and the station should occur, as candidates are encouraged to undergo negotiations before filing a complaint with the FCC, which must be filed prior to any court action on the matter.⁶³ After the FCC has made a ruling on the purported equal time violation, a proceeding to have the ruling reviewed may be brought in the appropriate circuit court of appeals.⁶⁴

The FCC has a variety of options for sanctioning a violation, including revocation of a station's broadcasting license (though this is unlikely for a minor equal time violation), cease and desist orders, or denial of a license renewal.⁶⁵ In extreme cases where there has been a willful and knowing violation of the Act's provisions or the FCC's regulations or orders, criminal sanctions are available.⁶⁶ However, there is no private cause of action for violation of equal time provisions,⁶⁷ which can leave candidates without a remedy should they incur any damages as a result of the FCC or a broadcaster denying their request.

60. *Chisholm v. FCC*, 538 F.2d 349, 353 (D.C. Cir. 1976). This ruling was later characterized as creating a two-part test for bona fide event programming: 1) whether the format of the program reasonably fit within the exemption category and 2) whether the decision to carry a particular event was the result of good faith news judgment, not partisan purposes. *A. H. Belo Corp.*, 11 F.C.C.R. 12306, 12308 (1996).

61. *Forbes v. Ark. Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994).

62. *Use of Broad. Facilities by Candidates for Pub. Office*, 24 F.C.C.2d 832 (1970).

63. The requirement that a candidate first exhaust administrative remedies has been enforced by courts. For example, a district court's refusal to rule on an independent political candidate's claim that an Arkansas state network improperly refused to grant him equal time because it was not first brought before the FCC was deemed proper by the Eighth Circuit. *Forbes*, 22 F.3d at 1427-28.

64. 47 U.S.C. § 402(b) (2000). These actions are not moot by virtue of the election having passed. *Flory v. FCC*, 528 F.2d 124, 127 (7th Cir. 1975).

65. 47 U.S.C. § 312; *id.* § 309(d).

66. *Id.* §§ 501-503.

67. *See Daly v. CBS, Inc.*, 309 F.2d 83, 85-86 (7th Cir. 1962); *Ackerman v. CBS, Inc.*, 301 F. Supp. 628, 631 (S.D.N.Y. 1969); *but cf. Weiss v. Los Angeles Broad. Co.*, 163 F.2d 313, 315-16 (9th Cir. 1947) (allowing action by candidate against radio station for deleting portions of speech, but dismissing for lack of factual support).

II. THE ACT INTERPRETED

A. *Court Interpretation*

As previously stated, courts have noted that the basic purpose of the equal time provision is to encourage the “full and unrestricted discussion of political issues by legally qualified candidates.”⁶⁸ Though nothing in the Act compels broadcasters to accept political advertisements,⁶⁹ “[b]roadcasters are not free to comply with the [e]qual [t]ime [r]ule by ignoring political broadcasting altogether.”⁷⁰ Therefore, while broadcasters need not allow advertising in all political races, they must feature at least some political broadcasting, and in those races for which they do accept broadcasting, they must afford equal time. Finally, although courts do occasionally interpret the Act, they tend to note that equal time matters should be deferred to the administrative expertise of the FCC.⁷¹ It is from these basic concepts that courts begin their interpretations of the Act and its exemptions.

In a close reading of statutory exceptions, the D.C. Circuit pointed out that by modifying each of the exempted categories with the words “bona fide,” Congress was making clear its reliance on the importance of newsworthiness in sustaining an exception.⁷² However, in determining whether an event is truly newsworthy, courts usually give great deference to the broadcaster itself. In the absence of evidence of favoritism toward a certain candidate, the FCC need only look to conditions of the broadcast and whether the broadcaster made a good-faith estimate that an event was newsworthy before airing it.⁷³ Therefore, so long as a broadcaster can make a showing that he or she believed an event to be newsworthy, no later analysis of whether that belief was reasonable or whether the event was actually newsworthy is undertaken.

Courts have also reviewed broadcasters’ interpretations of the limits of the exceptions themselves. For example, the D.C. Circuit rejected a station’s contention that three pre-recorded programs on opposing candidates that were aired back to back at three different points during the campaign were bona fide

68. *Farmers Educ. & Coop. Union of Am., N.D. Div. v. WDAY, Inc.*, 360 U.S. 525, 529 (1959); see *supra* note 16 and accompanying text.

69. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110-11 (1973).

70. *Roshon L. Magnus et al., Access Rights to the Media After CBS v. FCC*, 25 How. L.J. 825, 833-34 (1982). This is because of another broadcast doctrine, the reasonable access rule, which provides that a station’s license may be revoked for “willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy.” 47 U.S.C. § 312(a)(7).

71. *Maher v. Sun Publ’ns, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978).

72. *Office of Communication of United Church of Christ v. FCC*, 590 F.2d 1062, 1065 (D.C. Cir. 1978).

73. *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 424 (D.C. Cir. 1980).

news interviews.⁷⁴

B. FCC Interpretation

Although stations have no affirmative duty to make their airwaves available to any candidate, if they choose to do so, the FCC has clearly held that the stations must provide equal time to the opposing candidate *without* any input as to how that time is used.⁷⁵ In fact, any attempt on the part of a station to dictate what a candidate will say or what format he will utilize to say it constitutes "censorship," and thus is prohibited by the terms of the statute.⁷⁶

In addition, the FCC has noted that candidates themselves must monitor the media for use by opposing candidates. As a general matter, stations are not obligated to inform a candidate that his opponent has been granted time and affirmatively offer equal time to comply with the statute.⁷⁷ The broadcaster need only grant the request once it is made. However, when time is arranged, the time that is offered to the other candidate must be considered truly "equal" by the FCC.⁷⁸

C. Commentator Interpretation/Criticism

Not surprisingly, commentators have criticized many aspects of the equal time rule, from its contents to its application. One main area of comment is the application of the exceptions to the equal time rule, including their potentially chilling effects on speech. It is argued that in the few broadcast contexts in which none of the exceptions apply, the requirement of providing equal time is a "disincentive for broadcasters to air material that features candidates,"⁷⁹ because they may be viewed as providing partisan coverage rather than neutral information unless they willingly comply with equal time.

In addition, because of the lack of clarity surrounding the exceptions' application, broadcasters may be so cautious that they "forgo politically oriented programming that actually would not be subject to equal time constraints."⁸⁰ If

74. *King Broad. Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988).

75. *Control of Content of Broads. Under "Equal Time" Requirements of Section 315 of the Communications Act of 1934*, 40 F.C.C. 241, 242-43 (1952) (admonishing radio station for attempting to limit subject matter of candidate's appearance to the specifics of his office and prohibit general statements advancing Socialist ideology).

76. *Id.*

77. *See* Richard L. Colby, 37 F.C.C.2d 676, 676 (1972); James Spurling, 30 F.C.C.2d 675, 675 (1971). There may be an affirmative duty under certain "unusual circumstances," such as when an opponent is granted broadcast time a very short time prior to the election.

78. Joseph L. Dorton President/CEO Ameron Broad., Inc., 7 F.C.C.R. 6537 (1992) (Station fined for violating equal time provision where one candidate was allowed to speak freely on the air for nearly five minutes while his opponent was permitted only one minute to speak, had to respond to questions rather than speak freely, and had his answers cut off by the host.).

79. Smith, *supra* note 7, at 1503.

80. *Id.*

in fact broadcasters are taking this overly-cautious stance, society is being deprived of information that is withheld out of concern for possibly violating equal time.

The likelihood of broadcasters' fears diminishing the quantity of election coverage also raises First Amendment issues in the context of citizens' rights to receive information needed to participate in the political process.⁸¹ This right, it is argued, is far more compelling than is a political candidate's right to equal time.⁸² As one commentator stated, "while the Court has implicitly recognized the value in enabling candidates themselves to present [their relative positions and personal qualities] to the public . . . merely ensuring that each competing candidate is given reasonable . . . opportunities to do so is all that is necessary to achieve this result."⁸³

In addition to concerns about public access to information, the requirements also raise questions about broadcaster autonomy. One perspective is that the inquiry required to determine whether the exceptions' application is appropriate is overbroad because "the manner in which the Commission administers the equal time . . . provisions of the Act is more disruptive of licensee operations and more intrusive into editorial discretion than is necessary to achieve the compelling government interest to which these rules are dedicated."⁸⁴

In addition, critics wonder if the benefit to the public is enough to justify the burdens that the equal time rules place on broadcasters. One observation is that the loose and varied interpretations of the exceptions have "substantially diluted" the effect of the equal time rule.⁸⁵ Whether this dilution is an unfortunate side effect or a calculated result is debatable. One critic claims that "[m]uch of the confusion in the law is intentional. . . . [It] was written by congressmen who have a direct stake involved in maximizing their air time while minimizing that of their challengers."⁸⁶

Because of the non-uniform ways in which the equal time rule has been applied and its extremely lax enforcement by the FCC, critics wonder whether the public would even notice a difference if the rule were abrogated for good.⁸⁷ As

81. *Id.* at 1511.

82. *Id.*

83. *Id.*

84. *Id.* at 1512.

85. Rex S. Heinke & Heather L. Wayland, *Lessons from the Demise of the FCC Fairness Doctrine*, 3 NEXUS 3, 7 (1998) (concluding that regulations of media unfairness are ineffective and stifle the flow of information).

86. *What Is Equal Time?*, WASH. TIMES, Aug. 15, 2003, at A18 (characterizing the equal time rule as "a populist gesture to make it look as if the proverbial little guy can take on a political Goliath with equal access to the media").

87. Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557, 574-75 (2001) (analyzing FCC interpretation and concluding that reinstatement of personal attack and political editorial rules is not likely or necessary).

long ago as 1976, critics have been decrying the end of equal time,⁸⁸ yet it remains a part of life for candidates and broadcasters today.

III. THE “REAL” EXCEPTIONS: LOOPHOLES IN EQUAL TIME

“[T]he legal loopholes are big enough for even Conan the Barbarian to slip through.”⁸⁹

In application it is clear that the equal time exemptions actually exclude many more situations than just the four specific categories enumerated by the Act. When viewed in light of the Act’s intent to promote widespread political coverage, it becomes evident that its effectiveness as a promoter of public access to information is questionable. This section of the Note will describe areas which have not been specifically exempted from equal time but where, because of common interpretation and application, it is not applied. While the gaps are both specifically related and tangential to broadcasting, when combined, they demonstrate the reality that equal time is averted far more often than it is applied.

Though they are not mentioned in the exemptions, several groups of people who are commonly involved in political races are free from the benefits and burdens created by equal time. First, as previously mentioned, equal time does not create an obligation for broadcasters to feature third party candidates either as part of their organized debates or to ensure that all candidates have equal time on the air.⁹⁰ Similarly, broadcasters are not required to accommodate candidates who cannot afford air time comparable to that utilized by their opponents, which, experience dictates, will often disadvantage candidates from minor parties.⁹¹ Therefore, even if a third-party candidate does succeed in getting a broadcaster to grant a request for equal time, if he cannot afford a comparable or *any* time

88. “If we truly mean to restore openness and a sense of humor to our national life, we should acknowledge that equal time is dead and broadcasters are as free as newspapers to determine what coverage to give candidates and their speeches.” BITTNER, *supra* note 31, at 116 (quoting speech by Archibald Cox, to Anti-Defamation League of B’nai B’rith, New York, Dec. 7, 1976).

89. *What Is Equal Time?*, *supra* note 86, at A18.

90. *Chandler v. Ga. Pub. Telecomm. Comm’n*, 917 F.2d 486, 489-90 (11th Cir. 1990) (holding that public television station’s decision to exclude Libertarian candidate from debate was rational since network felt that a debate between only the two major party candidates would be of most interest and benefit to state citizens); *see also* *Maher v. Sun Publ’ns, Inc.*, 459 F. Supp. 353 (D. Kan. 1978).

There are competing views on how mainstream a third party candidate has to be to justifiably expect coverage. In the context of the 2004 Democratic nomination, journalists vary widely on how much coverage they think is appropriate for “fringe” candidates, who some consider “a waste of time,” although others feel they are deserving of coverage because of their “unique perspective” and “influence [on] other candidates.” Mark McGuire, *Fringe Presidential Candidates Want Equal Time*, TIMES UNION (Albany, N.Y.), Jan. 27, 2004, at D1.

91. *See, e.g., Chandler*, 917 F.2d at 489; *Maher*, 459 F. Supp. at 356-57. In both cases, minor party candidates were excluded from the debates.

slot, he receives no air time. In addition, even when a candidate can afford the same time slot utilized by his opposing candidate, the station need not grant the time on the exact same program.⁹² The effective result of the fact that third party candidates do not have to be invited to debates or to receive air time that they cannot afford is that the equal time rule, in practice, usually does not assist third party candidates at all. Although that result is not specifically enumerated in either the text or the purpose of the statute, the combination of other exceptions operates to essentially exclude third parties altogether.⁹³

Another situation that is immune from the equal time doctrine is third parties speaking on behalf of candidates. Equal time is not triggered by an appearance of family members, campaign workers or any other supporter speaking on behalf or in support of a candidate.⁹⁴ Therefore, broadcasts featuring coverage of endorsements by other political leaders or footage of supporters at a campaign rally do not require equal time so long as the candidate himself is not included, despite the fact that the clear intent of the appearance is to support the candidate and thus the spirit of the equal time provision is certainly implicated.⁹⁵

Another enormous group that is largely unaffected by equal time is incumbents. Although appearances by incumbents do trigger equal time during the actual campaign period, their appearances are not considered “use of a broadcast station” under the Act until they officially announce that they are a candidate for reelection.⁹⁶ Therefore, an elected official who will soon be up for re-election but has not yet announced his candidacy can appear on television without triggering the equal time rule for his opponents who *have* declared their candidacy for his seat. This helps explain “why candidates time an announcement that they are running for office very carefully, so as not to trigger the Equal Time rule requiring stations to give broadcast time in equal measure to their opponents.”⁹⁷ One example of the benefits of incumbency occurred at a 1980 press conference held by President Jimmy Carter. At this conference, which was carried by all of the networks in prime time, President Carter criticized his

92. See Harry Dermer, 40 F.C.C. 407, 407 (1964).

93. Lack of equal time was a common complaint by Ross Perot’s campaigns, especially since he was in the unique position of being a minor-party candidate with resources to purchase the time he desired. See, e.g., *Ross Perot v. ABC*, 11 F.C.C.R. 13109, 13114-16 (1996).

94. See *CBS, Inc. v. FCC*, 454 F.2d 1018, 1029 (D.C. Cir. 1971); *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 3-6 (3d Cir. 1950).

95. The FCC’s response to a 1970 letter from the Communications Counsel for the Committee on Commerce created some confusion on this issue. In the interpretive advisory statement now referred to as the “Zapple doctrine,” (or “quasi-equal opportunities rule,”) the FCC responded to a hypothetical posed by Mr. Zapple by concluding that “[w]here a spokesman for, or a supporter of candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues,” the (now defunct) fairness doctrine requires that time be provided to supporters for an opposing candidate. Nicholas Zapple, Communications Counsel, Comm. on Commerce, 23 F.C.C. 2d 707 (1970).

96. *Democratic Nat’l Comm.*, 34 F.C.C.2d 572, para. 6 (1972).

97. *ISSUES OF DEMOCRACY*, *supra* note 48, at 84.

rival for the Democratic nomination. In response to criticisms of nonenforcement, the FCC said that it “refused to second-guess licensee determinations . . . ‘absent strong evidence’ that bona fide news judgment was not being exercised.”⁹⁸ More recently, one critic has commented on this continuing issue: “by abandoning principles of ‘equal time,’ the [FCC] lets stations broadcast political propaganda of authorities in power [which is] entertaining but not enlightening.”⁹⁹

There are also other timing-related issues than can shield a candidate from equal time. For example, non-incumbent candidates-to-be who have not yet declared their candidacy can also make appearances of the sort that would trigger equal time if they were officially declared. Equal time is also avoided in the reverse situation—stations need not grant a candidate broadcast time in order to compensate for time provided to his opponents before he became a candidate.¹⁰⁰

Geography creates safe harbors from equal time as well. Although equal time applies to candidates at all levels of government, it is not triggered by coverage of elections beyond a station’s principal service area.¹⁰¹ This doctrinal gap has the most impact on local or regional races in rural markets, where coverage of the fact that, for example, the neighboring mayoral race has a standout democratic candidate would not trigger equal time for either of the candidates in the station’s primary viewing area.

Aside from groups of people and logistics such as timing and location, certain types of programs may also have an easier time escaping equal time requirements. As the recent Howard Stern ruling illustrates, the FCC’s judgments about which programs may be exempted from equal time are not at all affected by the fact that a show’s format may be non-traditional. As discussed in the Stern opinion, the FCC feels that “it would be unsound to rule that a program involving a unique or innovative approach to interviewing . . . somehow lacks sufficient licensee control evident in traditional news interview programs,” because that approach “would discourage programming innovation by sending a signal to broadcasters that to be exempt an interview program should adhere only to the format of certain programs mentioned by Congress over 25 years ago.”¹⁰²

Implicit in the previous statement is the fact that the FCC does not *want* to make it difficult for programs to be exempted from equal time requirements. In

98. The Kennedy for President Comm., 77 F.C.C.2d 964 (1980); Kennedy for President Comm., 636 F.2d 417, 432 (D.C. Cir. 1980) (upholding FCC ruling); *see also* LIVELY, *supra* note 18, at 239.

99. Edward Wenk Jr., *Threats to Democracy at Code-Red Level*, SEATTLE POST-INTELLIGENCER, Dec. 31, 2003, at B7.

100. Aspen Inst. Program on Communications and Soc’y, 55 F.C.C.2d 697 (1975); Hon. Joseph S. Clark, United States Senate, 40 F.C.C. 332 (1962).

101. Barry D. Umansky, *Political Broadcasting Primer*, Radio World Newspaper (June 5, 2002), at http://www.rwonline.com/reference-room/broadcast-law-review/05_rwm_BDUJune5.shtml (last visited Set. 29, 2004).

102. Infinity Broad. Operations Inc., 18 F.C.C.R. 18603, 18604 (2003) (quoting Multimedia Entm’t, Inc., 56 P.2d 143, 147 (1984)).

fact, in that same decision, the FCC noted that “licensees airing programs that meet the statutory news exemption, as clarified in our case law, need not seek formal declaration from the Commission that such programs qualify as news exempt programming under Section 315(a).”¹⁰³ This directive by the FCC seems to be urging broadcasters not to bother with petitioning for an exemption, but to rely on their independent judgment as to whether the exception applies to them—not merely as to specific broadcasts, but for their programs as a whole. The signal sent to broadcasters by both the content and outcome of this ruling is that all but the most outrageous requests will be granted—allowing more and more media outlets to ignore equal time.¹⁰⁴

The type of media used by candidates also affects whether they must comply with equal time. The Act’s applicability to cable, a major medium, is less than clear. Given the fact that almost ninety percent of television viewers have cable or satellite,¹⁰⁵ this is obviously a significant news source which includes several news-only channels. The FCC has promulgated its own rule which copies the language in the Act and applies equal time to “cable television system[s].”¹⁰⁶ However, the reach of this agency rule is unclear even to broadcasters. During Arnold Schwarzenegger’s gubernatorial candidacy, there was debate about whether and which media outlets were allowed to air his films. Cable television networks (which are exempt) attempted to distinguish themselves from cable television operators, such as Cox Cable, that deliver service to homes.¹⁰⁷ Nevertheless, several cable operators said they believe that they are exempt from the FCC equal time rules: “Cable and broadcast are not under the same rules. We are not required to block out any signals if it is coming from one of our

103. *Id.*

104. This deference from the FCC comes even as polls continually suggest that, in fact, these alternative programs are becoming a major news source. See David Bauder, *When Campaigns and Comedy Mix, the Nervous Laugh is from Lawyers*, SAN DIEGO UNION-TRIB., Oct. 7, 2003, at E5 (citing Pew Research center poll that “more than a third of people under age 30 said they got campaign news from comedy shows”); Lynn Smith, *Taking Sides? Jay Leno’s Role at the Governor-Elect’s Rally Has Many Wondering Just How Far the Blending of Politics and Entertainment Will Go*, L.A. TIMES, Oct. 20, 2003, at E1 (noting that “10 percent of Americans—and nearly half of those under 30—now use the late-night shows as sources of news about politics”).

105. *What Is Equal Time?*, *supra* note 86, at A18.

106. 47 C.F.R. § 76.205 (2004). A “cable television system” is defined as: “a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.” *Id.* § 76.5(a). The definition identifies four categories that are *not* considered cable systems, including, for example, a “facility that services only to retransmit the television signals of one or more television broadcast stations.” *Id.* § 76.5(a)(1).

107. Kit Bowen, *Networks Hold Off Airing Schwarzenegger Movies*, Hollywood.com, Aug. 13, 2003, at <http://www.hollywood.com/news/detail/article/1724895>.

programming partners,” said one Cox spokesman.¹⁰⁸ Interestingly, during the California elections, some clearly exempt cable channels did elect to comply with the spirit of equal time. For example, both the Sci-Fi channel and FX elected to suspend scheduled airings of Schwarzenegger action films.¹⁰⁹

One smaller but still relevant medium is public access television. Equal time provisions do not apply to public access networks because “the open nature of access automatically makes time available to all who request it.”¹¹⁰ While this seems to make sense, it creates the result that candidates with regularly scheduled public access shows may campaign on those shows without providing equal time.¹¹¹

Online media is another news source on which equal time has no effect, despite the fact that it is increasingly supplementing and, in some instances, replacing broadcast. Even if the rule were generally extended to apply to online media, the definition of what is considered a “use” for the purposes of the requirement may have to be reevaluated, since a candidate could utilize the internet without ever displaying his likeness or making a formal “appearance.”¹¹² One article noted that because of the exemptions “[m]any electronic journalists assume that the equal-time and other political broadcasting rules never apply to their work.”¹¹³

Publications, another untouched medium, are also not subject to equal time requirements.¹¹⁴ Though this is an obvious point, since the print media is outside

108. *Id.*

109. Sallie Hofmeister, *FX Takes Hero Out of Action; Network Pulls Schwarzenegger Films*, L.A. TIMES, Aug. 14, 2003, at C1. However, Sci-Fi rewarded its own civic mindedness by airing a Schwarzenegger marathon immediately following the election. *Sci Fi Channel Readies a Schwarzenegger Marathon*, SAN JOSE MERCURY NEWS, Oct. 9, 2003.

110. DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6:82 (2004).

111. See Bill McAuliffe, *Candidates and Incumbents Are Using Cable TV to Get the Word Out*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Sept. 22, 2003, at 1B.

112. Campbell, *supra* note 16, at 539-40.

113. Kathleen Kirby, *Rules of the Race*, RADIO AND TELEVISION NEWS DIRECTORS ASS'N COMMUNICATOR, Nov. 1999, available at <http://www.rtnda.org/rtndf2/publications/rules.html> (last visited Sept. 29, 2004).

Teletext created a similar inquiry in the 1980s. A combination of print and electronic media which used electronics to transmit text, teletext was excepted from the equal time requirement because it was “not a medium by which a candidate can make a personal appearance.” Teletext Rules, 48 Fed. Reg. 27054, 27061 (June 13, 1983) (to be codified at 47 C.F.R. pts. 2, 73, 74); see Jeffrey S. Hurwitz, Note, *Teletext and the FCC: Turning the Content Regulatory Clock Backwards*, 64 B.U. L. REV. 1057 (1984). Although teletext is no longer common, the FCC's determination that it was not subject to equal time could be an indicator of the outcome of online media should the FCC ever take a position.

114. In 1974 the Supreme Court unanimously decided that a newspaper is under no obligation to give any sort of equal time—regardless of the paper's economic power. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974); see Adrian Cronauer, *The Fairness Doctrine: A*

of the purview of the FCC's powers, it is still important to consider this medium in order to obtain a global view of election coverage. Implicit in the rationale for equal time is the notion that hearing or seeing a candidate on the radio or television results in a greater awareness of their candidacy or leads the public to believe that they were somehow better or more important than other candidates because they received network coverage. Although this might have been a legitimate concern in 1934, it is far less clear that a television appearance has the same impact on citizens in today's media-proliferated society.

Finally, regardless of where equal time is *supposed* to apply, the real measure of its effectiveness depends on enforcement—another area in which the FCC has opted for a hands-off approach. The FCC does not intervene in alleged or even blatant equal time violations without a specific complaint.¹¹⁵ And many candidates are reluctant to report possible violations because filing a complaint against a show decreases their chances of being an invited guest of that show in the near future.¹¹⁶ Therefore, when, for example, Jay Leno toes the line of equal time by allowing Arnold Schwarzenegger to both announce (while not yet a “legally qualified candidate”) and celebrate (after his candidacy has ended) his

Solution in Search of a Problem, 47 FED. COMM. L.J. 51, 53 (1994) (“If the *Miami Herald*, delivered to 37 percent of all households in its region, escapes any public service obligations, why should each of a dozen local television stations and forty local radio stations face the prospect of losing their licenses when disagreements arise over ‘fairness’?”).

115. Bauder, *supra* note 104, at E5; Steve Friedman, *Columbia, MO, Hospital Center Board Candidates Spar over Radio Remarks*, COLUMBIA DAILY TRIB., April 4, 2003.

In the years 1973 to 1976, a total of 6254 complaints were filed regarding alleged violations of equal time rules on television. Of the twenty-six station inquiries conducted by the FCC in response to these complaints, only twelve resulted in sanctions. In the prior four years, from 1969-1972, only 1950 complaints were filed alleging television violations. STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 212-14 (1978).

The FCC has not kept records of the number or type of complaints they have received for at least a decade. Email from Mark Berlin, FCC Policy Division, Media Bureau (Feb. 24, 2004, 07:59:34 EST) (on file with author). However, an FCC Media Bureau staffer estimates that “you could probably be able to count the number of written equal time complaints in an entire year on both hands.” Email from Mark Berlin, FCC Policy Division, Media Bureau (Feb. 23, 2004, 10:36:50 EST) (on file with author).

116. Bauder, *supra* note 104, at E5; Friedman, *supra* note 115. However, the prospect of losing a potential appearance does not dissuade every candidate. When the 2004 Democratic-nomination candidate Rev. Al Sharpton appeared on NBC's Saturday Night Live in December 2003, candidate Sen. Joseph Lieberman requested—and was granted—an equivalent twenty-eight minutes of free air time in states where both men were on the ballot. Mary Leonard, *In Lieberman Camp, A Lawyer Takes on the Fine Print*, BOSTON GLOBE, Jan. 25, 2004, at A20. Sen. Lieberman was the only candidate to make this request. Leah Garchik, *Daily Datebook*, S.F. CHRON., Feb. 5, 2004, at E16. However, more than two dozen NBC affiliates nationwide “opted (with NBC's blessing) not to air the episode” for fear of triggering equal time requirements. Gail Pennington, *They're Politicians, But They Play Guest Stars on TV*, ST. LOUIS POST-DISPATCH, Dec. 14, 2003, at C1.

campaign on *The Tonight Show*, few media-hungry candidates, present or future, are likely to complain.¹¹⁷ In addition, even when they do intervene, “[s]ince the mid-1970s, the Commission has steered a course of review that is more deferential to a licensee’s subjective judgment regarding the availability of an exemption.”¹¹⁸ In “retreat[ing] from the view that the Commission had an obligation to force stations to carry out specific public trustee obligations,” the FCC has moved toward the position that “broadcast stations ought to be governed by marketplace forces in their programming . . . decisions and that viewers . . . should exercise influence over licensees by turning the dials on their receivers rather than by petitioning the Commission for relief.”¹¹⁹

When considering the foregoing practical effects of the equal time exceptions, it becomes evident that the doctrine in its current state provides little or no protection for candidates and does not ensure that the public receives balanced coverage of political campaigns.

IV. SUGGESTIONS FOR THE FUTURE OF EQUAL TIME

Equal time is a doctrine which, despite its well-meaning roots, is currently serving no useful purpose. But why is this the case, and who is to blame? As they did with the now defunct fairness doctrine, critics are asking whether the FCC is “simply not enforcing” the equal time rules, or if perhaps, “broadcasters [are] so thoroughly compliant that no one [can] catch them in a violation?”¹²⁰ One response to this question is that there is actually very little to comply with, given the doctrine’s limited applicability after the overwhelming combination of explicit and implicit exceptions. The FCC has stated its position that those in doubt about equal time should trust their own judgment rather than petitioning for approval.¹²¹ Moreover, Congress is surely aware of the FCC’s repeated reluctance to enforce equal time, yet it has not revised or clarified the provision since making a minute semantic change in 1972.¹²²

This inattention is despite the fact that the statute containing the equal time rule, 47 U.S.C. § 315(b), contains the guidelines for how and what broadcasters may charge for airtime. This hotly contested issue has caused the statute itself to

117. During the California governor’s race, Leno went so far as to openly taunt equal time requirements by featuring a segment in which all of the other candidates were invited to the audience (eighty-one attended) to receive ten seconds of equal time. Leno then asked the candidates what they would do as governor and aired their responses simultaneously so that none was actually decipherable. Marvin Kitman, *Calif. Debate Cheated Us*, *NEWSDAY*, Oct. 5, 2003, at D15; Wilentz, *supra* note 51, at M6. The result? Criticism in the print media and silence from the FCC.

118. *LIVELY*, *supra* note 18, at 239.

119. *KRATTENMAKER*, *supra* note 13, at 148.

120. *Leweke*, *supra* note 87, at 574-75.

121. *See* Infinity Broad. Operations Inc., 18 F.C.C.R. 18603, 18604 (2003).

122. Pub. L. No. 92-225 § 103(a)(2)(B), 86 Stat. 3 (1972) (adding “under this subsection” following “No obligation is imposed . . .”).

receive a great deal of attention in the recent past, yet not one of the proposed revisions makes any change to the equal time rules in section (a).¹²³

A. *Three Options for the Future*

In light of its current state, in which the doctrine is weak and not completely serving its intended purpose, three possibilities arise for its future: continued adherence to established principles, increased enforcement by the FCC, or elimination of the doctrine.

1. *The Status Quo*.—Equal time's current operation, including its deficiencies, has been described throughout this Note. Without changes to the FCC's application of the statute, especially in the area of enforcement, equal time is likely to continue on its current course as a doctrine requiring cursory consideration from media lawyers, but not one that has much practical effect on mainstream election coverage.

The doctrine's longevity is perhaps an indicator that it is unlikely that it will be soon eliminated. In light of the extensive attention given to the broadcast charge provisions amended by the BRCA and the utter lack of attention directed at the equal time provisions in section (a), one must wonder whether the lack of attention it receives is a ratification by Congress that it is satisfied with the FCC's scheme. Perhaps it, along with the courts that have so noted,¹²⁴ feel that substantial deference is owed to the FCC and that it is inappropriate to interfere with their interpretation by statutory revision.

2. *Increased Enforcement of Current Statute*.—Another option to increase the effectiveness of equal time would be enhanced enforcement by the FCC. In order for changes to be meaningful, many of the current enforcement policies would have to be modified. For example, to ensure that candidates who are deserving of equal time because of an opponent's appearance actually receive that time, they would have to be notified of all qualifying appearances. Rather than requiring candidates to self-monitor nationwide media coverage, broadcasters would have to design a system whereby a grant of time to one candidate results in notification to opponents. However, this would raise the dispute of whether the purchasing candidate or the station would be responsible for providing this notice. A decision on this point requires a value judgment about who should bear the administrative burden of equalizing political coverage. If placed on candidates, some of whom may already have their funds overextended by campaign expenses, this additional requirement may keep them off the air entirely.¹²⁵ However, placing the burden on broadcasters will potentially result

123. *McConnell v. Federal Elections Commission* upheld the McCain-Feingold-sponsored Bipartisan Campaign Reform Act (BCRA). 124 S. Ct. 619, 639-40 (2004). Although BCRA amended section (e) of the Act, the ruling made no mention of the equal time provisions of the statute.

124. *Maher v. Sun Publ'ns, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978).

125. For a discussion of whether broadcasters should be required to provide free airtime to candidates, see Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of*

in less political coverage if broadcasters then refuse to sell time to candidates since they cannot pass along the charges to their viewers, who can view the broadcasts for free.

Therefore, an obvious setback increased enforcement is the burden on broadcasters. Since under the current scheme, they are not *required* to broadcast all election coverage, it is possible that the burdens created by these monitoring responsibilities would decrease the amount of coverage given to elections generally. In addition, the administrative costs generated by a notice requirement would likely be defrayed in costs to candidates—another area that is highly regulated.¹²⁶

In addition to notice requirements placed on broadcasters, the FCC would have to change its policy of not reviewing potential violations without a complaint.¹²⁷ Because many equal time violations may go unreported or even unnoticed, the current system of requiring an aggrieved candidate to both discover and complain about the violations (possibly damaging their chances of being invited on that same program) does not result in thorough, evenhanded application of the doctrine.¹²⁸ However, a change to the current policy would require the FCC to police the airwaves with meticulous detail. The obvious disadvantage to this requirement is the resulting administrative burden. Perhaps some of this burden could be decreased by instituting a dual notice system, whereby notice is provided to both the FCC and the opposing candidate at the same time upon any sale of time to a candidate.

Aside from the logistics of enforcement, changes to the substantive interpretation by the FCC, which currently results in several unintended loopholes, would be required to obtain effective enforcement. Special attention would have to be paid to common equal time victims, such as third party candidates. The disparate impact that the requirement seems to have on them would be cured in part by changes in notice and affirmative enforcement. Changes to the regulatory scheme would not, however, change the reality that third party candidates often have fewer financial resources than major party candidates and so still might have trouble purchasing the airtime even if it were more readily offered.¹²⁹

In addition, the FCC would have to refrain from its deferential approach to broadcasters' judgment. As outlined in Part I.B, many of the components of the

Television Broadcasters?, 45 DUKE L.J. 1089, 1104-09 (1996).

126. See 47 U.S.C. § 315(b) (2000) (governing lowest unit charges for sale of broadcast time).

127. As recently illustrated by the 2004 Super Bowl halftime show, the FCC is at times outspoken about what it views as a violation of its rules. Although undoubtedly there were eventually formal complaints lodged with the FCC, as soon as the day after the incident, Chairman Powell was promising a full investigation into Janet Jackson's alleged indecency. *ABC News: World News Tonight: Indecent Exposure: The Jackson/Timberlake Show* (ABC television broadcast, Feb. 2, 2004), available at 2004 WL 62998005.

128. The FCC no longer keeps data on how many equal time complaints it receives. See Email from Berlin, *supra* note 115.

129. See Hundt, *supra* note 125, at 1105-06.

equal time requirement are evaluated by reference to several factors used to determine whether, for example, something is to be considered a statutory “use.” Most of these factor tests include some review of the newscasters’ subjective judgment about whether or not the appearance, program, etc. was considered newsworthy.¹³⁰ Because of this consideration, the FCC can often satisfy itself that its factors test has been passed based on newscasters’ testimony about their own broadcast coupled with satisfaction of other factors. Because of this reliance on subjective rather than objective factors, broadcasters are justified in believing that if they can rationalize their belief that equal time was not required, the FCC will probably release them from its requirements.

When it does determine that a violation occurred, the FCC also might need more stringent tools for punishing equal time violations. Although this is an area that would require statutory revision, undoubtedly a large, publicized increase in fines for equal time violations would make broadcasters more conscientious.

However, it is not necessary that Congress enact statutory changes in order to increase enforcement. As an administrative agency, the FCC is part of the executive branch and is subject to vacillations in political support from both politicians and the public.¹³¹ For example, following the 2004 Super Bowl,¹³² the broadcast doctrine of indecency has gained new life, leading to increased programming time delays and disclaimers on network television. Congress is now calling for higher fines for violations of indecency standards to give the FCC better tools with which to enforce this doctrine, which it now perceives to have increased importance.¹³³ As this potential reform indicates, the values of the current administration are manifested in the actions taken by its agencies.¹³⁴

130. See, e.g., *supra* notes 53-54, 58 and accompanying text.

131. Four of the five current FCC Commissioners (two Democrats & three Republicans) were appointed by President Bush in 2001 or 2002. The FCC’s current Chairman, Michael Powell (R), was nominated to the Commission by President Clinton in 1997. He was appointed Chairman by President Bush in 2001 to replace Chairman William Kennard (D) who resigned from the FCC in January 2001, six months before his commission was set to expire. Chairman Powell is Secretary of State Colin Powell’s son. Fed. Communications Comm’n, *Biography of FCC Chairman Powell*, at http://www.fcc.gov/commissioners/powell/mkp_biography.html (last visited Sept. 22, 2004). See also Fed. Communications Comm’n, *Biography of William Kennard*, at <http://www.fcc.gov/commissioners/previous/kennardbio.html> (last visited Sept. 22, 2004).

132. During the 2004 Superbowl halftime show, performer Janet Jackson suffered what has been termed a “wardrobe malfunction,” which resulted in a portion of her costume being removed, exposing her breast to millions of viewers. Various subsidiaries of Viacom Inc. (CBS’s parent company) were fined the \$550,000 statutory maximum for violating broadcast indecency standard. Press Release, FCC, FCC Proposes Statutory Maximum fine of \$550,000 Against Viacom-owned CBS Affiliates for Apparent Violation of Indecency Rules During Broadcast of Super Bowl Halftime Show (Sept. 22, 2004), 2004 WL 2138631.

133. One proposal currently under consideration includes a tenfold increase in fines for indecency violations. Michelle Knueppel, *TV Execs Object to Increase in Fines for On-Air Indecency*, L.A. DAILY NEWS, Feb. 27, 2004, at N14.

134. With regard to its sudden strong reactions to alleged indecency on television, one writer

Therefore, under a different administration, it is possible that even if procedural execution of the statute remained the same, the outcome of some of the agency decisions would differ.¹³⁵ Without specific equal time data to compare enforcement during the last few presidencies, these differences are indeed speculative, but seem to be made more likely by the renewed focus on the FCC generally since the 2004 Super Bowl.

Overall, increased enforcement would require some specific political motivation, followed up by increased time and energy by both the FCC and broadcasters. Though it certainly has critics, equal time isn't as divisive as an issue like indecency, which carries with it moral and religious judgments. On its face, providing equal time seems like an admirable goal that few are likely to speak out against, and those who are unhappy with its execution, such as minor party candidates, are not calling for its revocation so much as its revision. However, without an equal time interpretation or ruling that is somehow unfavorable to the current controlling party or a change in leadership, sudden interpretive changes resulting in strengthened enforcement seem unlikely.

3. *Elimination of Equal Time.*—Another option, of course, is to do away with the equal time rule entirely. An argument may be made that this has in fact already happened by operation, as the FCC seemingly refuses to enforce all but the most egregious violations. Two factors supporting elimination are the weakness that results from equal time's lack of applicability to numerous situations and the FCC's docile enforcement.

Elimination of the doctrine would have some positive results. For example, it is possible that it would actually increase political coverage generally. As previously stated, some broadcasters err on the side of limiting political programming to avoid allegations of equal time violations.¹³⁶ If they are uncertain whether a certain broadcast would be exempted, they may choose not to air it at all for fear of triggering equal time.¹³⁷ With the requirements lifted, broadcasters might actually increase political coverage (albeit it of their favored party and/or candidates).

notes that "Powell's FCC [has] played to the Republican base in the run-up to a national election. . . . Self-appointed moral guardians are forever waiting for any opportunity to attempt to enforce their personal rigid codes on everyone else." Tom Jicha, *The Shot Heard 'Round the Dial*, SOUTH FLA. SUN-SENTINEL, Feb. 28, 2004, at 1D.

135. For example, even if the current deferential standard remained in place, the broadcasters to which the FCC showed deference could change depending on the views of the current administration. If today Howard Stern is viewed as indecent, albeit a bona fide newscaster, under a more liberal administration, perhaps conservative talk radio hosts would fail under the same indecency standard. See Eric Deggans, *Clear Channel Becomes Conveniently 'Responsible,'* ST. PETERSBURG TIMES, Feb. 27, 2004, at 2B (quoting Rush Limbaugh asking if the "federal government start[s] to define what is okay for someone to say on radio . . . what happens if a whole bunch of John Kerry [or] . . . Terry McAuliffe types end up running this country?" (omissions in original)).

136. See Smith, *supra* note 7, at 1503.

137. *Id.*

As a matter of administration, elimination of the doctrine would alleviate the burdens on both the FCC and broadcasters caused by continued consideration. Although its general response is that the doctrine is not applicable to inquiring broadcasters, the FCC still must go through the procedures to receive and review complaints and issue occasional opinions. The resources used to do so could be directed at other areas of the agency's jurisdiction. It would also save broadcasters from having to scrutinize every broadcast featuring political candidates to see whether it might violate equal time provisions and from reviewing and responding to equal time requests by opposing candidates, which take up both administrative and air time.

Although in many ways the doctrine is weak, there would be consequences to eliminating it altogether. First, the fact remains that equal time is effective in some circumstances. As with Senator Lieberman during the 2004 presidential primary campaign, candidates still can and do take advantage of the requirement to ensure that broadcasters are not unfairly excluding coverage of certain candidates.¹³⁸ However, this doesn't necessarily help *all* candidates, only major party candidates with enough resources to monitor and contest equal time violations. The choice then becomes whether the doctrine is worth keeping to at least ensure equal coverage of all major party candidates or whether, based on the wide variety of media outlets, it is now fair for those candidates to be in the same situation as minor party candidates, that is, with virtually no equal time protection at all.

In addition, there is something to be said for the notion that broadcasters must at least take equal time into account when making programming decisions. Although they may often creatively avoid it, it is possible that the habit of going through the motions of determining whether equal time is applicable is beneficial for viewers, in that broadcasters are going to at least attempt to eliminate any gross violations. Similarly, at least some citizens value the notion of equal time.¹³⁹ It is hard to imagine a way to quantify the loss of confidence in election coverage that could result from elimination of the doctrine, as at least those who are complaining about it are already aware of its lack of force.

While complete elimination might seem a drastic solution, in light of the repeals of both the fairness doctrine and personal attack rules, it is not completely infeasible because it is clear that statutory schemes requiring content monitoring have been abolished in the past.¹⁴⁰ However, the continued existence of the reasonable access rule seems to indicate that political election coverage is one area in which Congress wants to remain involved.¹⁴¹ The inequities of a system requiring broadcasters to provide some election coverage, but *not* requiring them

138. See Leonard, *supra* note 116, at A20.

139. See, e.g., Perot, 11 F.C.C.R. 13109 (1996); Paula S. Schlesinger Against Pub. Television Station WMUL-TV, 87 F.C.C.2d 773 (1980) (alleging equal time violations).

140. Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989) (FCC decision to repeal fairness doctrine was not arbitrary and capricious); Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (ordering FCC to repeal personal attack rule).

141. 47 U.S.C. § 312(a)(7) (2000).

to balance that coverage at all seem obvious. However, in reality, media outlets designed to advance only one political view do exist—though such stations are generally open about their political leanings, and viewers are likely to understand that they are getting only one point of view when they choose to watch. By continuing to require at least major broadcast networks to attempt to balance their coverage, citizens have the option of receiving their coverage mainly from those networks that they perceive to be more balanced.

B. Recommendation

A determination about what should become of equal time is complicated because it is difficult to separate the reality of what the doctrine has become from what it could and was meant to be. It seems unnatural to be “against” a doctrine with such well-meaning roots.¹⁴² Realistically, though, conclusions must be drawn while facing the reality that reform, especially dramatic reform, is unlikely. It is not reasonable merely to claim that if the doctrine were perfectly enforced in a vacuum, it would be worth maintaining.

Part of the judgment about what should become of equal time requires pragmatic assessment of whether it can have a meaningful role in today’s society. One can idealize its existence and argue that any rule intended to equalize election coverage and increase public access to information is worth maintaining even if it is flawed.

However, it is hard to strenuously argue that equal time should be upheld at all costs if one is realistic about its practical effect. It does not apply to cable, print media or the internet—three major sources of news. It was created during a time when election coverage was much scarcer and hearing only one of two candidates on the radio might have made a difference in who received one’s vote. Today, candidates are seen and heard through a multitude of media, and voters can seek out information about candidates that they are interested in rather than sitting by their radios hoping for a sound bite. Some celebrity candidates are already known and respected by voters before they enter the political arena. It is hard to imagine that requiring a handful of radio and television programs to intricately time all candidate coverage to ensure precise equality is increasing the actual quality of our election coverage.

However, if it’s not doing any harm, it might be appropriate to preserve the spirit of the rule in light of its limited applicability only to media outlets that citizens can access for free (provided they have the technology to receive the signals). But arguments can be made that the doctrine does cause harm by artificially ensuring that election coverage will feature more than one candidate without assuring that it will feature them all. To the extent there is a public expectation of equal time, candidates are being disserved by its inconsistent application. Therefore, limited application even in the narrow context in which

142. In fact, even Russia’s election law provides for equal time. Alex Rodriguez, *Really Cover Putin? Not Likely; Journalists Invited to Travel with the President Soon Find They’re Expected to Chronicle Through the Kremlin’s Eyes*, CHI. TRIB., Mar. 7, 2004, at 4.

it is currently applied is overly idealistic if it is not done precisely enough so that viewers can be more confident that they are receiving balanced coverage from those outlets.

Rather than forcing network attorneys and late night comedians to continue to struggle with equal time without benefit to voters or consistent application to candidates, the equal time doctrine should be abandoned—at least until a time when media development has stalled to the point where meaningful reforms may be made.

CONCLUSION

The year 2004 is equal time's seventieth year. To say that the media landscape has changed since its inception is a gross understatement. It is hard to imagine why a doctrine that was created to respond to advancements in technology has so clearly failed to keep up with its roots. Instead of expanding and changing to meet our modern society's need for information, the FCC has broadened equal time's exceptions until they now nearly swallow the whole. Rather than the four specific exceptions conceived of by Congress after twenty-five years of observing its initial formulation, numerous unstated but consistently applied loopholes have been created and maintained by FCC interpretation.

Though tempting, blaming the FCC alone ignores the fact that equal time is a statutory doctrine that Congress has chosen to leave untouched for decades. Couple that with frequent changes in FCC leadership and suddenly it seems surprising that the doctrine has enjoyed as much stability (albeit virtual stagnation) as it has, rather than a more cyclical lifespan in terms of its popularity and strength.

Declaring an end to equal time would really only have effects behind the scenes. For the most part, it would not change the substance of most American election coverage. Even if voters did notice its abolition, their disappointment could be alleviated by resort to the media outlet which best reflects their views, finally untainted by the guise of impartiality.

